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ANNOTATED

OF CASES DECIDED IN

THE HOUSE OF LORDS. THE PRIVY COUNCIL.
ALL DIVISIONS OF THE SUPREME COURT
AND
COURTS OF SPECIAL JURISDICTION

1936
VOLUME 2
PAGES 857-1702

Consulting Editor :

ROLAND BURROWS, K.C.

Recorder of Cambridge

Managing Editor of Halsbury's Laws of England, Hailsham Edition

General Editor :

W. J. WILLIAMS, B.A.,

of Lincoln's Inn, Barrister-at-Law

THE LAW JOURNAL,
37-39 ESSEX STREET, LONDON, W.C.2



These reports are cited thus :

[1936] 2 All E. R.

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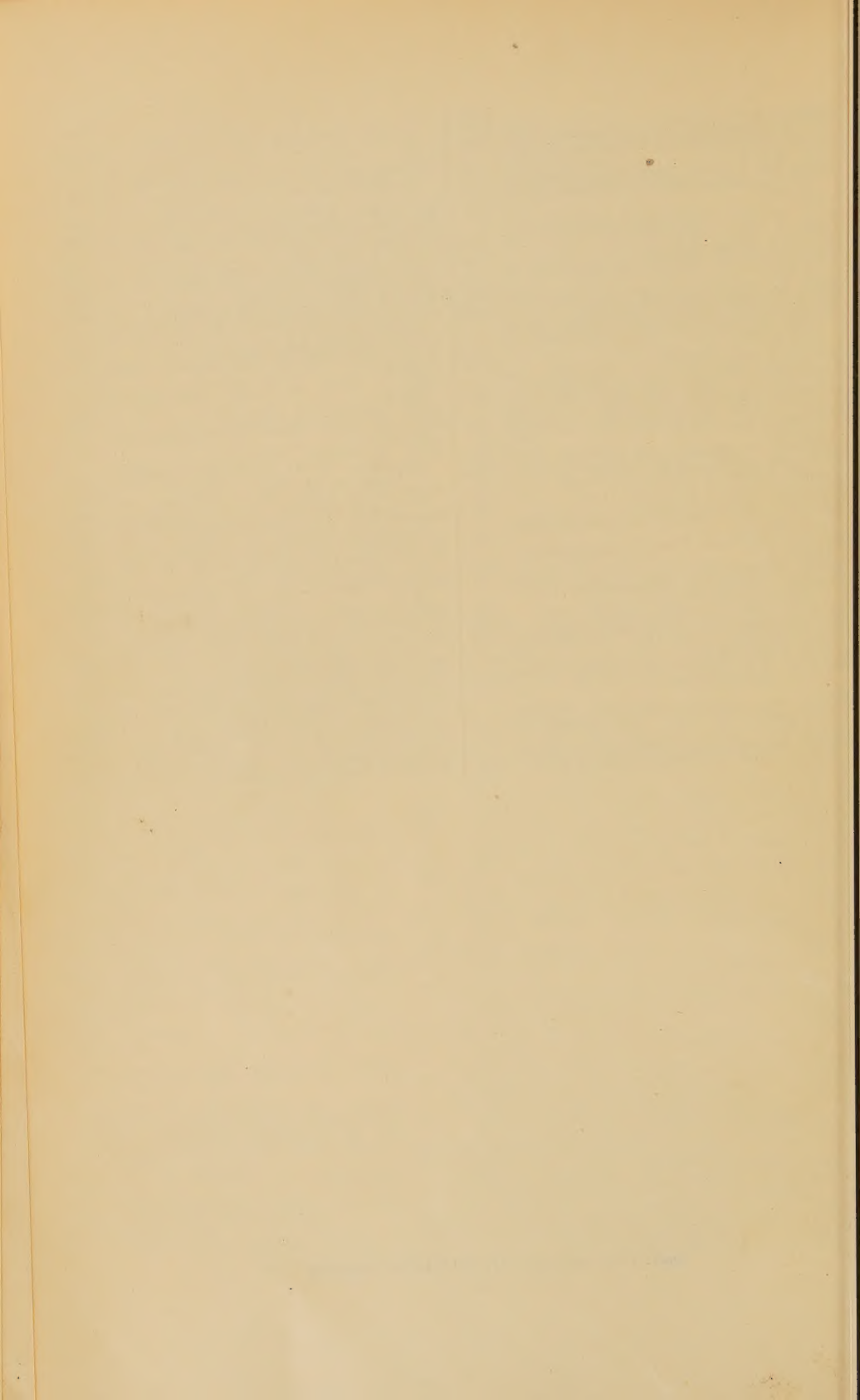
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COMMISSIONER OF INCOME TAX, BENGAL *v.* MERCANTILE
BANK OF INDIA, LTD., AND OTHERS.

[PRIVY COUNCIL (Lord Thankerton, Lord Russell of Killowen, Lord Maugham, Sir Sidney Rowlatt, Sir Shadi Lal), **March 27, 30, May 20, 1936**].

Income Tax—Company—Capitalisation of profits—Distribution of accumulated profits—Issue of debentures subsequently redeemed.

Companies having large accumulations of undistributed profits issued debentures to the holders of their preference shares. The debentures were dated Mar. 24, 1931, and were repayable at latest on Dec. 31, 1940. They were in fact all redeemed prior to Feb. 28, 1933. All such preference shares, and therefore all the debentures, were held by trustees of the will of the late Sir David Yule and the transaction was designed to enable them to meet the very heavy duties payable in respect of his estate :—

HELD : (i) the position under the Indian Income-tax Act in this respect was the same as that under the Imperial Act.

(ii) the effect of the transaction was not a distribution of any income, profits or gains within the Indian Income-tax Act, 1922, s. 4.

(iii) in such a case the personal motive or purpose of the individual shareholders, even if they have a controlling interest in the company, is irrelevant, if it is made out that the company has in fact capitalised the accumulated profits.

[EDITORIAL NOTE. This case proceeds upon the principle that where there has been a determination by a company to convert profits into capital, provided the company has power to do so such determination is binding upon everyone, including the Crown. The conversion in the present case was the issue of debentures to shareholders and the almost immediate redemption of them. The effect of this transaction, in the view of their Lordships, was not a distribution of profits and gains which were assessable to tax in the hands of the shareholders, but a distribution of capital that did not attract income tax.

AS TO CAPITALISATION OF PROFITS, see HALSBURY, Hailsham Edn., Vol. 17, pp. 252-254, paras. 511-517; and FOR CASES, see DIGEST, Vol. 28, pp. 106-109, Nos. 657-670.]

Cases referred to :

- (1) *Inland Revenue Comrs. v. Blott, Inland Revenue Comrs. v. Greenwood*, [1921] 2 A.C. 171; 28 Digest 107, 663.
- (2) *Inland Revenue Comrs. v. Fisher's Executors*, [1925] 1 K.B. 451; [1926] A.C. 395; 28 Digest 107, 664.
- (3) *Swan Brewery Co. Ltd. v. R.*, [1914] A.C. 231.
- (4) *Income Tax Comr. v. Shaw, Wallace & Co.* (1932), 59 L.R. Ind. App. 206; Digest Supp.
- (5) *London County Council v. A.-G.*, [1901] A.C. 26; 28 Digest 73, 392.
- (6) *Bouch v. Sproule* (1887), 12 App. Cas. 385; 9 Digest 596, 3934.

APPEAL from a judgment of the High Court of Judicature at Fort William in Bengal, delivered on a reference of questions of law by the commissioner of income-tax, Bengal, under the Indian Income-tax

Act, 1922 (XI of 1922), s. 66 (1). The facts are set out in the judgment of their Lordships delivered by LORD THANKERTON.

A. M. Dunne, K.C., Gavin Simonds, K.C., and Reginald P. Hills, for the appellant.

A. M. Latter, K.C., L. P. E. Pugh and J. B. Lindon, for the respondents.

LORD THANKERTON: This is an appeal from a judgment of the High Court of Judicature at Fort William in Bengal, delivered on a reference of questions of law by the commissioner of income-tax, Bengal, under the Indian Income-tax Act, 1922 (XI of 1922), s. 66 (1).

These questions of law arose in course of an assessment for super-tax and surcharge made by the income-tax officer upon the respondents, as trustees of the late Sir David Yule, for the year ending Mar. 31, 1932, in respect of Rs. 5,71,30,000, being the nominal amount of certain bonus debentures issued to them in respect of their shareholding in certain companies in the year ending Mar. 31, 1931. The respondents appealed to the assistant commissioner, Calcutta, and, while the appeal was pending, the commissioner, of his own motion, made the present reference to the High Court, asking the following questions of law, viz.:

First Question.—The assessee being in his own name and through nominees the holder (a) of the whole of the share capital of companies as specified in the case, and (b) together with two trustees in their individual capacity, of the whole of the share capital of one company as specified: these companies being investment companies of the nature described in the case: and the said companies having issued to the assessee by way of bonus, debentures which have subsequently been paid-off through the transaction specified in the case: was there by these transactions any income, profits or gains which accrued or arose to or were received by the assessee, within the meaning of sect. 4 of the Act?

Second Question.—If any such income did arise, when did it so arise?

Third Question.—If any such income did arise, was its quantum an amount corresponding (a) to the full amount of the debentures or (b) to such part only as derived from the received and accumulated revenue profits of the companies, and excluding such part as derived from appreciated valuations of the companies' investment-holdings?

Fourth Question.—In the latter alternative, on what principles are the respective quanta to be accounted and ascertained?

The parties were agreed in asking for the decision of the Board on the first question only. The facts are fully set forth in the statement of the case by the commissioner, but they may be summarised as follows: the late Sir David Yule died on July 3, 1928, leaving a very large estate, which mainly consisted of holdings of shares in 30 companies, with 20 of which the present appeal is concerned, being the companies which issued the debentures in question. The commissioner has divided these 20 companies into two groups; in the first group all the capital was ordinary share capital, wholly held by the trustees in their own name or through nominees, the trustees being the beneficial owners of all the shares, and the debentures were issued wholly in the name of the trustees.

In the second group, the trustees and their nominees did not hold all the ordinary share capital, the other shares being held by others of the 30 companies, and in one case, that of the Calcutta Discount Company, Ltd., certain shares were held by two of the trustees individually. In the case of each company in the second group an issue of preferred ordinary shares was made to the trustees alone, and the debentures in question were thereafter issued to the trustees in respect of their holding of the preferred ordinary shares.

For the purposes of the argument before their Lordships no distinction was drawn between the two groups of companies as regards the procedure under which the debentures came to be issued, and the procedure of the Calcutta Discount Company, Ltd., was taken as sufficiently typical of the procedure of all the companies for that purpose.

The following is an extract from a special resolution of that company passed on Jan. 3, 1930, and confirmed on Jan. 22, 1930 :

2. That the capital of the company be increased by the creation of 725 preferred ordinary shares of Rs. 100 each, and the same be issued to such persons as the secretaries may think fit.

(a) The preferred ordinary shares shall rank in priority to the ordinary shares both as to dividend and repayment of capital, and shall carry the right to a non-cumulative dividend of such amount as may be declared by the company in general meeting, but so that the ordinary shares shall not be entitled to any dividend in any year unless and until at least 5 per cent. has been declared on the preferred ordinary shares for that year. The said preferred ordinary shares shall have no further right to participate in profits or surplus assets in a winding up.

(b) The date from which such shares shall rank for dividend shall be Jan. 1, 1930, or such later date as the secretaries shall think fit.

Of these 725 preferred ordinary shares, 629 were allotted to the respondents, as trustees of the estate of the late Sir David Yule, and the residue (96) partly to one trustee and partly to another.

At the same time the Calcutta Discount Company, Ltd., adopted a new article as art. 126 of its articles of association, from which the following is an extract :

126. The company in general meeting may at any time and from time to time pass a resolution that any sum not required for the payment or provision of any fixed preferential dividend and (a) for the time being standing to the credit of any reserve fund or reserve account of the company, including premiums received on the issue of any shares, debentures or debenture stock of the company, or (b) being undivided net profits in the hands of the company, be capitalised, and that such sum be set free for distribution, and be appropriated as capital to and amongst the preferred ordinary shareholders and ordinary shareholders respectively in the proportions in which they would have been entitled thereto if the same had been surplus distributable profits, and in such manner as the resolution may direct, and such resolution shall be effective ; and the secretaries shall in accordance with such resolution apply such sum in paying up in full any unissued shares in the capital or any debentures or debenture stock of the company on behalf of the shareholders concerned, and appropriate such shares, debentures or debenture stock,

and distribute the same credited as fully paid-up amongst such shareholders in the proportions aforesaid in satisfaction of their shares and interests in the said capitalised sum, or shall apply such sum or any part thereof on behalf of the shareholders aforesaid in paying up the whole or part of any uncalled balance which shall for the time being be unpaid in respect of any issued shares of any of the said classes held by such shareholders or otherwise deal with such sums as directed by such resolution.

The following is an extract from minutes dated Mar. 14, 1931 :

CALCUTTA DISCOUNT COMPANY, LTD.

Minutes of the secretaries, dated Mar. 14, 1931.

The secretaries having taken into consideration the financial position of the company and being satisfied that such position justified the distribution from the reserve fund of Rs.1,45,00,000 in the form of a special capital bonus free of income tax it was decided to recommend to the shareholders the payment of such a special capital bonus to be satisfied by the distribution among the members holding preferred ordinary shares in the company on Mar. 24, 1931, of Rs.1,45,00,000 of debentures carrying interest at 3 per cent. per annum from Jan. 1, 1931, in proportion to the number of preferred ordinary shares respectively held by such members.

The notice convening the requisite meeting having been prepared, it was decided to issue the same to the shareholders.

Andrew Yule & Co., Ltd.,

(Sgd.) J. SIME,

Managing Director,
Secretaries.

At an extraordinary meeting of the Calcutta Discount Company, Ltd., held on Mar. 24, 1931, the following resolutions were passed :

(1) That it is desirable to capitalise a sum of Rs.1,45,00,000 being part of the amount standing to the credit of the reserve fund and accordingly that a special capital bonus of Rs.1,45,00,000 free of income tax be declared and such capital bonus be applied on behalf of the persons who on Mar. 24, 1931, were the holders of the 725 issued preferred ordinary shares of the company in payment in full for Rs.1,45,00,000 of debentures of the company carrying interest at 3 per cent. per annum from Jan. 1, 1931 (and to be charged upon the whole undertaking of the company).

(2) That to the above resolution the secretaries be and they are hereby authorised to create and issue such debentures as a special capital bonus free of income tax credited as fully paid and to distribute the same to the holders registered on Mar. 24, 1931, of the 725 preferred ordinary shares in the company's capital in proportion to the number of such shares held by them respectively in full satisfaction of such capital bonus as aforesaid.

The following is an extract from the minutes :

CALCUTTA DISCOUNT COMPANY, LTD.

Minutes of the secretaries, dated Mar. 25, 1931.

The resolution passed at the extraordinary general meeting of the company held on Mar. 24, 1931, that it was desirable to capitalise Rs.1,45,00,000 being part of the company's reserve fund having been considered and it was decided to create and issue a series of debentures of a total nominal value of Rs.1,45,00,000 consisting of 28 debentures of Rs.5,00,000 each, one debenture of Rs.4,00,000 and five debentures of Rs.3,00,000 each.

tures of Rs.20,000 each all carrying interest at the rate of 3 per cent. per annum, and to distribute the same to the holders registered on Mar. 24, 1931, of the 725 issued preferred ordinary shares in proportion to the number of such shares held by them respectively in full satisfaction of the capital bonus. One debenture for Rs.5,00,000 was thereupon sealed and directed to be registered with the registrar of joint stock companies and that on obtaining the registrar's certificate the remaining debentures be sealed and issued.

As a result of the foregoing proceedings, debentures of the Calcutta Discount Company, Ltd., to the amount of Rs.1,25,80,000 were issued to the respondents, the residue of the issue being allotted severally to the two trustees who each held a small quantity of the preferred ordinary shares.

The debentures are dated Mar. 24, 1931, and the amounts secured were repayable at latest on Dec. 31, 1940, and were repayable at the option of the company at any time after three months' notice.

The circumstances under which these debentures came to be issued are conveniently summarised in the judgment of the High Court as follows :

All the companies had very large accumulations of undistributed profits. The actual figures are immaterial. The trustees had to meet very heavy outgoings for duties both in the United Kingdom and in India in relation to the estate of the deceased, and it was to provide funds for such duties that a scheme was devised whereby accumulated profits would come into their hands and be available for the purpose of meeting such charges.

In fact the debentures were all redeemed by the companies at various dates prior to the end of Feb., 1933, but the crucial date in the present question is the date of the issue of the debentures.

The High Court decided against the claim of the Crown, holding that the case was governed by the principles laid down by the House of Lords in the cases of *Inland Revenue Comrs. v. Blott* (1), and *Inland Revenue Comrs. v. Fisher's Executors* (2). They rejected an argument of the Advocate-General directed against the validity of the proceedings of the companies, upon the ground that it was not open on the case as stated by the commissioner, which proceeds on the footing that the transactions of the companies are unimpeachable. This argument was not pressed at the hearing before their Lordships.

The question being whether, by the transactions in question, any income, profits or gains accrued or arose to or were received by the assessee within the meaning of the Indian Income-tax Act, s. 4, the Crown maintained (first) that the decisions in the cases of *Blott* (1) and *Fisher* (2), which were under the Imperial Income Tax Act, were not applicable, and that the decision of this Board in *Swan Brewery Co., Ltd. v. R.* (3) applied in the present case, and (second) that, in any event, the facts in the present case rendered it distinguishable from the cases

of *Blott* (1) and *Fisher* (2), in respect that the purpose of the transactions in the present case was not a genuine company purpose, but for the individual benefit of the controlling shareholders.

In the first place, their Lordships are of opinion that, as regards the point here in issue, there is no ground for distinction between the Imperial Act and the Indian Act. In *Income Tax Comr. v. Shaw, Wallace & Co.* (4), at p. 212, SIR GEORGE LOWNDES, in delivering the judgment of the Board, while expressing a general warning against treating questions under these Acts as *in pari materia*, said :

The object of the Indian Act is to tax "income," a term which it does not define. It is expanded, no doubt, into "income, profits and gains," but the expansion is more a matter of words than of substance.

This states compendiously the same view as is expressed in regard to the Imperial Act by LORD MACNAGHTEN in *London County Council v. A.-G.* (5).

In the case of the *Swan Brewery Co.* (3) the company had passed resolutions by which its capital was increased by a new issue of shares, and a portion of the accumulated profits standing to the credit of the reserve fund corresponding to the amount payable on allotment of the shares was transferred to the credit of the share capital account, the new shares being then allotted as fully paid among the shareholders *pro rata*. It was held by the Board that these transactions were in effect a declaration of a dividend within the meaning of the Dividend Duties Act, 1902, of Western Australia, under sect. 2 of which the word "dividend" was defined as including "every profit, advantage or gain intended to be paid or credited or distributed among the members of any company." In delivering the judgment of the Board, LORD SUMNER, referring to the argument of the appellant company, said, at pp. 235 and 236 :

The duty claimed is not, it is said, a duty on or in proportion to any advantage either to the company or the shareholder measured by the increased stability of the company's own position or the increased facility to the shareholder in marketing his shares : it is measured by and is levied upon the whole nominal value of the new shares allotted, which is not the same thing as the value of the advantage distributed. Is this argument sound ? Their Lordships agree with the Supreme Court of Western Australia in thinking that it is not. There can be no doubt that the new shares were distributed and were not the same things as the old ones. They certainly were supposed to be advantages to the members of the company, none the less that the making of the issue was probably an advantage to the company also. In so flourishing a business doubtless they really were advantages. The new shares were credited as fully paid, and, what is more, they were fully paid, for after the allotment the company held £101,450 as capital produced by the issue of those shares and for that consideration, and no longer as an undivided part of its accumulated reserve fund. True, that in a sense it was all one transaction, but that is an ambiguous expression. In business, as in contemplation of law, there were two transactions, the creation and issue of new shares on the company's part, and on the allottees' part the satisfaction of the liability to pay for them by acquiescing

in such a transfer from reserve to share capital as put an end to any participation in the sum of £101,450 in right of the old shares, and created instead a right of general participation in the company's profits and assets in right of the new shares, without any further liability to make a cash contribution in respect of them. In the words of PARKER, C.J. : "Had the company distributed the £101,450 among the shareholders and had the shareholders repaid such sums to the company as the price of the 81,160 new shares, the duty on the £101,450 would clearly have been payable. Is not this virtually the effect of what was actually done ? I think it is."

It is unnecessary to resume in detail the facts in the cases of *Blott* (1) and *Fisher* (2). In *Blott's* case (1), the company applied accumulated profits in satisfaction of the amount due on the issue of bonus shares, while in *Fisher's* case (2) accumulated profits were similarly applied in respect of bonus debentures. In the latter case VISCOUNT CAVE, L.C. (at p. 400) states the principle of the decision in *Blott's* case (1) by quoting the opinion of VISCOUNT HALDANE in that case, at p. 184, which was as follows :

My Lords, for the reasons I have given I think that it is, as matter of principle, within the power of an ordinary joint stock company with articles such as those in the case before us to determine conclusively against the whole world whether it will withhold profits it has accumulated from distribution to its shareholders as income, and as an alternative not distribute them at all, but apply them in paying up the capital sums which shareholders electing to take up unissued shares would otherwise have to contribute. If this is done the money so applied is capital and never becomes profits in the hands of the shareholder at all. What the latter gets is no doubt a valuable thing. But it is a thing in the nature of an extra share certificate in the company.

The case of bonus debentures was held to be indistinguishable from that of bonus shares. Nor does it seem possible to distinguish the facts of the present case from those in *Fisher's* case (2), apart from the contention of the Crown that the real purpose of the transactions in the present case form a relevant ground of distinction.

The case of the *Swan Brewery Co.* (3) was referred to in certain of the opinions in *Blott's* case (1). VISCOUNT HALDANE (at p. 188) says :

There the transaction was in many respects analogous to that here. But the taxing statute was couched in very different language. . . . There were expressions in the judgment which may be construed as having gone rather further, and treated the payment made by the company as equivalent in substance to a payment by the company to the shareholders, and by them back to the company. It may have been so, and without a fuller knowledge of the facts in the case and of the local law than the report discloses, it is difficult to be quite sure about the point, but what is clear is that the wide character of the word "advantages" was a primary consideration in what was said by their Lordships who took part in advising His Majesty. I therefore do not feel embarrassed by the decision in that case.

VISCOUNT FINLAY (at p. 199) thought that the reasoning in the *Swan Brewery Co.* case (3) was inconsistent with the decision of the House of Lords in *Bouch v. Sproule* (6). VISCOUNT CAVE (at p. 202) said that the de-

cision in the *Swan Brewery Co.* case (3) was no doubt fully supported by the definition clause in the Western Australia Act, but that, otherwise, he would hold it to be inconsistent with *Bouch v. Sproule* (6). LORD DUNEDIN who dissented in *Blott's* case (1), stated (at p. 203) that the *Swan Brewery Co.* case (3) was a decision upon an Australian statute in the words of which if anything became an "advantage" it would fall within the tax. LORD SUMNER, who also dissented in *Blott's* case (1), and also delivered the judgment of the Board in the *Swan Brewery Co.* case (3), was clearly of opinion (at p. 217) that what was said by the Judicial Committee in the latter case as to the effect in law and in business of a distribution of bonus shares, was part of the decision and could not be distinguished from *Blott's* case (1).

Having carefully considered the judgment in the *Swan Brewery Co.* case (3), and the varying views taken of it in *Blott's* case (1), their Lordships are of opinion that the judgment must be regarded as having been primarily based on the distribution of the new shares being advantages within the meaning of the particular Act under consideration, while the further expression of opinion in the judgment rather regarded the transaction as involving, in substance, a distribution of accumulated profits among the shareholders and a repayment by them to the company, although the operation was in fact short-circuited. For the purpose of the present question, their Lordships are clearly of opinion that the decisions under the Imperial Income Tax Act are more relevant to the similar question under the Indian Income-tax Act, than a decision under the different terminology of the Western Australian Act.

Lastly, their Lordships are clearly of opinion that the personal motive or purpose of the individual shareholders, even if they hold a controlling interest in the company, is irrelevant, if it is made out that the company has in fact capitalised the accumulated profits. It is sufficient to quote from the opinion of LORD SUMNER in *Fisher's* case (2), in the decision of which he concurred, as follows, at p. 411 :

In any case desires and intentions are things of which a company is incapable. These are the mental operations of its shareholders and officers. The only intention, that the company has, is such as is expressed in or necessarily follows from its proceedings. It is hardly a paradox to say that the form of a company's resolutions and instruments is their substance. At any rate, in the present case, there is no need to distinguish between form and substance in the transaction itself or to refer to desires or intentions, further than to examine what was done, for everything was carried out in plain terms and without concealment. What the requisite majorities of the shareholders desired and intended is pretty plain too, but that is another matter.

Their Lordships are, therefore, of opinion that the first question of law referred by the commissioner of income-tax should be answered in the negative, that the judgment of the High Court should be affirmed,

and that the appeal should be dismissed with costs. They will humbly advise His Majesty accordingly.

Solicitors: *The Solicitor, India Office* (for the appellant); *Nye, Moreton & Clowes* (for the respondents).

[Reported by T. A. DILLON, ESQ., Barrister-at-Law.]

Applied. MIDDLESEX C.C. *v.* MIN. OF LOCAL GOVERNMENT AND PLANNING. [1951] 2 All E.R. 732.

MARRIOTT *v.* MINISTER OF HEALTH.

Distinguished. MIDDLESEX C.C. *c.* (Slessor and Romer, L.JJ., and Eve, J.), June 22, MIN. OF LOCAL GOVERNMENT & PLANNING. [1952] 2 All E.R. 709.

Public Health—Housing—Clearance area—Compulsory purchase order—Demolition before local inquiry—Housing Act, 1930 (c. 39), sched. II, part 1, para. 5.

The Nottingham Corporation on June 4, 1934, resolved that a certain area should be a clearance area, and on the same day made a compulsory purchase order in respect of part thereof. Upon that part of the area there were 39 houses of which 27 were the property of the applicant. On July 21 the applicant instructed a builder to demolish all the 27 houses, and the demolition work began on July 26 and was completed before Oct. 2. Notice of the order was served on the applicant on July 30, and he lodged his objection on Aug. 15. On Oct. 2 the public local inquiry began at which the fact of the demolition was proved. On Jan. 16, 1935, the Minister confirmed the order. The applicant questioned the validity of the order and applied under the Housing Act, 1930, s. 11 (3), to have it quashed:—

HELD: before confirming an order the Minister ought to consider matters as they are at the time of the local inquiry, and as there was at that time no subject-matter on which the Act could operate, the Minister ought not to have confirmed the order either with or without modification.

[EDITORIAL NOTE. The point here is confined within quite narrow limits and is this: the Minister cannot confirm an order that could not have been put into force at the time the local inquiry in respect thereof was held. A compulsory purchase order under a clearance scheme cannot be put into force if the area to be purchased is cleared by demolition before the local inquiry is held, and still more is this the case where this fact is proved at the inquiry. The enforcement of such an order is based upon the existence of insanitary property upon the ground included in the area.]

FOR CLEARANCE AREAS, see HALSBURY, Supplement to Vol. 23, paras. 1034-1042; and FOR CASES, see DIGEST, Supp. Public Health, Nos. 502 (g) to 502 (r).]

Cases referred to:

- (1) *R. v. Minister of Health, Ex p. Davis*, [1929] 1 K.B. 619; Digest Supp.
- (2) *Errington v. Minister of Health*, [1935] 1 K.B. 249; Digest Supp.

APPEAL by the Minister of Health from a judgment of SWIFT, J., given on Oct. 29, 1935, on a notice of motion under the Housing Act, 1930, s. 11.

On June 4, 1934, the Nottingham City Council made an order for compulsory purchase of some property in the City of Nottingham

belonging to a Mr. Marriott. This compulsory purchase order followed upon a declaration that the area in question should be a clearance area. On July 21, 1934, Mr. Marriott instructed builders to demolish the property, and on Oct. 2, 1934, the demolition was completed. On Oct. 2, 1934, the local public inquiry was opened by the inspector appointed by the Minister of Health. On Jan. 16, 1935, the order of the local authority was confirmed by the Minister without qualification so far as the property of Mr. Marriott was concerned.

The Attorney-General (Sir Donald Somervell, K.C.) and Valentine Holmes, for the appellant.

R. M. Montgomery, K.C., and Arthur Capewell, for the respondent.

The Attorney-General : The learned judge took too narrow a view of the machinery of the Housing Act, 1930. The words which can be relied upon to favour the applicant are those in sect. 1 (3). Having regard to the Act as a whole, the learned judge gave to the words too great a weight because the Act has other purposes than the mere demolition of houses. The application of the learned judge's principle would be this. Nothing was done by the landlords until the local authority took action. One man says : if we can pull down our houses before this matter goes to the Minister, we can defeat the scheme and prevent the local authority having any power over the future development of the land. Looking at the Act as a whole, demolition is only one of the purposes for which the local authority are entitled to purchase.

A further point is the relevant date. Is the Minister compelled in law to disregard the facts existing at the date the local authority made the order and to consider the facts as they existed at the time the order comes up for confirmation ? The Act does contemplate the local authority having powers other than those of merely effecting demolition. The local authority may sell or let the land subject to such conditions as they think fit. That is an important right conferred by Parliament upon local authorities in respect of land properly included within a clearance declaration. That purpose can be defeated—if the learned judge is right—by owners pulling down their property before the date of confirmation by the Minister. The relevant date is the date on which the local authority acts. If a man demolishes his houses, he is in fact admitting that the local authority was right in including them in the order. The person holding the inquiry would have to direct his mind to the state of the houses on the date the council made the order.

One commences with the condition of affairs when the local authority makes the order. Objections can be put in and a public local inquiry can be held. The houses can be looked at. The Minister, or the officer who makes the report to him, in his discretion may have regard to undertakings by property owners as to what they will do in the future. But in matters of jurisdiction in confirming an order made by the local

authority, the Minister is entitled to proceed on the facts as they existed at the time when the order was made. That can only be confirmed which exists. The local authority cannot be deprived of their powers by the action of property owners after the order has been made. [He referred to *R. v. Minister of Health, Ex p. Davis* (1); *Errington v. Minister of Health* (2).]

Valentine Holmes, following on the same side : The only matter the court has to consider is the position as it was on June 4, 1934. There is no provision in the Act for the Minister making any order in confirmation. The Minister is in the habit of calling his confirmation an order. The compulsory purchase order is something distinct. The applicant in his notice of motion, asks that the compulsory purchase order of June 4 shall be quashed. The court has only to consider the compulsory purchase order, as will be seen by reference to sect. 11. It is provided by subsect. (1) that the provisions of this section shall have effect to compulsory purchase orders made under the Act, and the date on which they shall come into operation. If any person wishes to question the validity of any order, he may make an application within six weeks after confirmation. That is the compulsory purchase order and not any order made by the Minister. That is borne out by reference to sect. 1 (3), where two ways are provided in which the local authority may proceed to get a clearance order. It may make a clearance order or it may purchase the land. The only order is the local authority's order. Things which have happened since the order was made are matters that the Minister would be entitled to take into consideration in deciding whether he would confirm the original order with or without modification.

Montgomery, K.C. : Confirmation by the Minister has the same purpose as the making of the order and it has no other purpose. On the statutes, it is reasonably clear that the purpose of making the original order and the confirmation of it is the demolition of houses. Sect. 1 of the Act contains the essentials of the matter. Houses fit for habitation must be excluded. Therefore one is dealing with houses and not with an area. If land has no buildings upon it, it cannot be the subject of a clearance order. When the order comes up for consideration, the Minister must consider what the authority had to consider, namely, whether there were buildings. At the time of the inquiry, there would have to be buildings upon the land. If there were no buildings at the time, the report of the inspector must be that it is not an area on which demolition can take place. The main object aimed at by the Act could no longer be carried out—neither of the two objects mentioned in sect. 5 of the Act could be done if the buildings had been already demolished. The Minister could not exercise his powers under the Act if the buildings no longer existed. If the Minister found there were no longer any facts in existence at the time of the inquiry which rendered demolition

possible, the decision to make the order of the local authority effective cannot be a judicial decision and must be *ultra vires*. The local authority might want the order to be enforced because they had a purpose of public utility in view. That is not an attitude a local authority can take up or the Minister listen to. That which might happen if the purpose is carried out is not a matter which the Minister can regard. [He referred to *Errington v. Minister of Health* (2).]

The Attorney-General replied.

SLESSER, L.J. : In this appeal there is raised undoubtedly a question of very considerable public importance relating to the proper construction of certain sections of the Housing Act, 1930, and it is a case which by its decision may considerably affect the powers of local authorities to deal with insanitary areas in their districts. Whatever may have been the purpose of the legislature in passing this Act and other ameliorative Acts, we have to interpret the law as we find it, and it may well be that there has been omitted from the Housing Act, 1930, power to deal with certain contingencies such as those which have arisen in the present case.

The material facts of the case are as follows. A Mr. Marriott was at the time of the making of a compulsory purchase order, to which I will refer, the owner of a number of houses in the city of Nottingham round about two streets called Marriott's Square and Marriott's Row. Next to his property there was some other property called Mount Court and North Cottages. Mount Court and North Cottages did not belong to Mr. Marriott but to other persons. There had been, in the year 1931, an order made affecting these properties and other properties by the local authority, but as no power was sought by the local authority for the Minister to confirm that order, it is not necessary in this case to consider it. The order which we have here to consider was made on June 4, 1934. On that same day there was carried by the Nottingham City Council a resolution within the meaning of the Housing Act, 1930, s. 1, the carrying of which resolution is a necessary preliminary to the making of the order. The section in question is as follows :

Where a local authority, upon consideration of an official representation or other information in their possession, are satisfied as respects any area in their district : (i) that the dwelling-houses in that area are by reason of disrepair or sanitary defects unfit for human habitation, or are by reason of their bad arrangement, or the narrowness or bad arrangement of the streets, dangerous or injurious to the health of the inhabitants of the area, and that the other buildings, if any, in the area are for a like reason dangerous or injurious to the health of the said inhabitants ; and (ii) that the most satisfactory method of dealing with the conditions in the area is the demolition of all the buildings in the area, the authority shall cause that area to be defined on a map in such manner as to exclude from the area any building which is not unfit for human habitation or dangerous or injurious to health and shall

pass a resolution declaring the area so defined to be a clearance area, that is to say, an area to be cleared of all buildings in accordance with the provisions hereinafter contained.

As I have said, in accordance with that subsection, the local authority on June 4 carried what I may call a declaratory resolution that the area defined upon the map should be a clearance area. That is an area which included the property of Mr. Marriott and some other properties in Mount Court and North Cottages, all of which are marked red upon the map which has been placed before us. The order which was made upon the same day, after reciting that the local authority have been satisfied of the matters and reciting that a resolution passed at the meeting of the council held on June 4 has declared the area so defined to be a clearance area, goes on to say :

And whereas in pursuance of their powers under the said section by a resolution passed at a meeting of the said council on June 4, 1934, the council have determined to proceed to secure the clearance of the area by purchasing the land hereinafter mentioned comprised in the area and themselves undertaking or otherwise securing the demolition of the buildings thereon.

That is a reference to sect. 1 (3), which gives to a local authority, after they have declared an area to be a clearance area, two methods by which the buildings in the area may be removed. The language is as follows :

So soon as may be after a local authority have declared any area to be a clearance area, they shall, in accordance with the appropriate provisions hereafter in this Act contained, proceed to secure the clearance of the area in one or other of the following ways, or partly in one of those ways and partly in the other of them, that is to say : (i) by ordering the demolition of the buildings in the area ; or (ii) by purchasing the land comprised in the area and themselves undertaking, or otherwise securing, the demolition of the buildings thereon.

It was the second of those methods which was employed by the council in their order. Now, having made that order, it became necessary for them to proceed to obtain the confirmation of the Minister. The material section upon that matter is sect. 10 of the Act, which says that :

(1) Where a local authority have determined to purchase land under this part of this Act, they may purchase that land by agreement—[that did not arise in this case, but then follow these words]—or they may be authorised to purchase that land compulsorily by means of an order (in this Act referred to as “a compulsory purchase order”) made and submitted to the Minister and confirmed by him in accordance with the provisions of the second schedule to this Act.

The local authority, in accordance with that provision, did duly submit to the Minister for his confirmation the compulsory purchase order which they intended to make. In addition they had by their order sought to take further powers ; that is to say, in accordance with sect. 3 of the Act, they sought to purchase certain other land as being lands

surrounded by the clearance area, and the acquisition of which they said was reasonably necessary for the purpose of securing a cleared area of convenient shape and dimensions and being land adjoining the said clearance area, the acquisition of which was reasonably necessary for the satisfactory development or user of the cleared area. In their order as submitted to the Minister, in Part I is contained the property of Mr. Marriott (the respondent) and other persons, Mrs. Lewis, Mr. Gibbons, and certain trustees ; and in Part II, lands outside the clearance area, which they sought also to purchase under sect. 3 of the Act.

Now continuing, it is provided in sect. 10 that the Minister may confirm in accordance with the provisions of the second schedule to the Act, and the second schedule to the Act contains machinery whereby that confirmation may be effected. By clause 4 of the second schedule :

Before submitting the order to the Minister the local authority shall : (a) publish in one or more newspapers circulating within their district a notice in the prescribed form stating the fact of such an order. . . . ; (b) serve on every owner, lessee and occupier . . . notice in the prescribed form stating the effect of the order and that it is about to be submitted to the Minister for confirmation, and specifying the time within and the manner in which objections thereto can be made.

In accordance with those provisions, and it is not suggested that anything at this stage was not perfectly in order, Mr. Marriott was duly served with the notice and the requisite publications were made. Mr. Marriott took objection, however, that among other matters he was engaged in demolishing the very property which was the subject of the complaint. He says that his property was in a state of demolition, but before the inquiry had actually started to take place, that is to say, on Oct. 8, all the property of Mr. Marriott had been completely removed except certain low boundary walls, and there were upon the land at the time of the inquiry no insanitary dwellings at all. The demolition had started on July 26, 1934 ; on Aug. 7 the order had been submitted to the Minister for his confirmation ; on Oct. 2 the demolition was completed, and therefore there can be no question but that at the time of the inquiry there were no buildings of Mr. Marriott's upon the site at all. In these circumstances the inquiry was duly held, and a complaint has been made, which has not found favour with the learned judge, and which is the subject of a cross-appeal, entered for greater precaution by Mr. Montgomery, that these irregularities interfered with the conduct and validity of the inquiry. We have not heard argument upon that point, and at present I will assume that the inquiry was properly and duly held and reports properly and duly made to the Minister. On Jan. 16, 1935, the Minister confirmed the order of the local authority to which I have referred ; that is the order of June 4, 1934. He says that in pursuance of the powers conferred upon him he orders that :

The land adjoining the clearance area and numbered 49 on the map referred to

in the order hereinafter confirmed shall be excluded from the said order made by the council.

That was a part of the land which was sought to be purchased under sect. 3 of the Act as land adjoining the area which has been complained of; but the Minister confirmed the said order as modified, and the confirmation of the order covers the whole of the land coloured red including the land of Mr. Marriott. In those circumstances, there being an order so confirmed and thus operative for the compulsory purchase upon Mr. Marriott, Mr. Marriott took advantage of sect. 11 of the Act to question the validity of the order as confirmed, as he is entitled to do by subsect. (3) of that section. That section substitutes for the older method of questioning an order by prohibition or *certiorari* or other legal proceedings, proceedings before a single judge in the High Court. The language is as follows :

If any person aggrieved by an order desires to question its validity on the ground that it is not within the powers of this Act or that any requirement of this Act has not been complied with, he may, within six weeks after the publication of the notice of confirmation, make an application for the purpose to the High Court, and . . . the court . . . may quash the order either generally or in so far as it affects any property of the applicant.

The matter came before SWIFT, J., and he has made an order quashing the order of the Minister in so far as it affects the property of Mr. Marriott, and it is from that judgment that this appeal is brought.

Now the substance of Mr. Montgomery's case here for his client is this : he does not seek to impeach the order made by the local authority. He concedes that at the time when the local authority made their order on June 4, 1934, the facts which gave them power to make that order existed. They were entitled by resolution to declare that Mr. Marriott's property was insanitary. They were entitled, in the absence of agreement (and he concedes there was no agreement) to seek a compulsory purchase order. But he says that owing to the fact that Mr. Marriott had demolished his property at any rate before the time of the inquiry which the Minister had occasioned to be held upon Oct. 8, there was upon Oct. 8 and thereafter no property on which the Minister could exercise his powers in confirming the order; that is to say, that the foundation of the power, both of the Minister and of the local authority, when as stated in sect. 1 there is a building unfit for human habitation or dangerous or injurious to health, was lacking at the time of the inquiry by the inspector, was lacking at the time of the confirmation by the Minister, and that it avails the Minister nothing that such an order had proper reference to buildings unfit for habitation or otherwise falling within the section at the time when the local authority acted.

The learned Attorney-General, on the other hand, who appears here for the Minister of Health, argues primarily that as it is conceded that

the original order by the local authority was properly made, the Minister had power to confirm that order so made, and he points out to us (and if I may respectfully say so, there is great force in his argument) the inconveniences which arise from any other view. For example, it is clear that in the present case the area which has been decided to be the subject of the order is considerably larger than that of Mr. Marriott; it includes the other property to which I have referred. There is or may be also the question of an exercise of powers under sect. 3 of the Act, of the purchase of surrounding property. He reminds us that whereas formerly the powers of the local authority were limited, when they compulsorily acquired an area of land, to building houses on that area in place of the demolished ones, as was decided in *R. v. Minister of Health, Ex p. Davis* (1), now by this Act authority is given under sect. 5 to a local authority thereafter to sell or let the land and to deal with it in various ways to them seeming proper; and he points out that Mr. Marriott, by demolishing those houses, if Mr. Montgomery's view is right, has interfered with the powers of the local authority which are deemed necessary in the public interest, and that the Act can never have intended such a state of affairs to have arisen on these facts. Now in the first place Mr. Marriott, of course, is concerned only for his own property, and it is in regard to his property that I consider this matter. In my view Mr. Montgomery is right in his contention that the Minister had not before him the necessary material on which he could properly confirm this order of the local authority. I am not concerned in this case to consider by what means the Minister might or might not inform himself of the condition of affairs other than through the local inquiry. Our attention has been called to the case of *Errington v. Minister of Health* (2). I do not think it necessary here to consider that matter because of the facts of this case: that the Minister did consider nothing other than that which he had learned at the local inquiry; the inspector, at the time when he held the local inquiry, was already apprised of the fact that the property had all been demolished, and it is not necessary in this case to impute to the Minister any further knowledge than that which he gained through his inspector at the local public inquiry. Having that knowledge and that information, I think it impossible to say that he could have confirmed this order, and for the following reason. I have already pointed out that under the Act it is necessary for the local authority, in order that their order may be operative, to obtain the confirmation of the Minister of the order made and submitted to the Minister and confirmed by him in accordance with the provisions of the second schedule. That second schedule contemplates, in para. 5, that the Minister may, if he thinks fit, confirm the order with or without modification, and, subject to certain questions which arise on the proviso to that paragraph, I think that those words

indicate that in modifying the order he must be taken to have regard at any rate to the matters which have appeared at the local inquiry, and that if modification is to extend to the exclusion of any particular house or part of the area, or even a refusal to confirm at all, there must be some subject-matter on which his jurisdiction can operate. It will be remembered that in sect. 1 of the Act, in the earlier part it was expressly provided that the area defined on the map should be defined in such a manner as to exclude from the area any building which is not unfit for human habitation or dangerous or injurious to health. The Minister is given power expressly by para. (iii) of the proviso to clause 5 of the second schedule, himself also, in considering whether he will confirm or modify, to deal with that matter in these words :

If the Minister is of opinion that any land included by the local authority in a clearance area ought not to have been so included, he shall in confirming the order so modify it as to exclude that land for all purposes from the clearance area.

It has been considered as a possible view that that clause is there dealing with the facts as they were at the time when the local authority did, as he thinks, improperly include certain houses, and that the Minister's power to exclude that land is limited to what is contained in para. (iii), and that his general powers of modification under clause 5 are to be limited to that particular matter, which would be a case of dealing with the subject-matter on the facts which existed at the time when the local authority had cognizance of them. But I cannot so read the language. I think those words are there inserted in relation to what follows, that is to say :

but if in any such case he is of opinion that the land may properly be purchased by the authority under sect. 3 of this Act, he shall further modify the order so as to authorise the local authority to purchase that land under the said sect. 3 and not as being land comprised in the clearance area.

That is to say, having modified the order by excluding the land from being part of the clearance area, he may nevertheless, if he thinks it is right, permit the local authority to treat it as land under sect. 3, that is to say, land not in the clearance area but land surrounded by or adjoining the clearance area, in which case different provisions and different considerations may arise. For example, that land might be or very likely would be land which was not in itself in an insanitary state at all, because it would be merely purchased to secure a cleared area of convenient shape and dimensions, and different questions of compensation and the like might arise. But I find it quite impossible to read that paragraph, which seems to me to be primarily devised not to extend the power of the Minister, which I think he would have under the opening words of para. 5 of the second schedule, to modify the order by excluding a part of the order, so as to extend it to giving him power to enable the authority

to purchase under sect. 3, although the authority have not themselves sought that power ; and that that was necessary is shown by proviso (ii) which says that :

the order as confirmed by the Minister shall not : (a) authorise the local authority to purchase compulsorily any land which the order would not have authorised them so to purchase if it had been confirmed without modification.

It was therefore necessary, if the Minister were to be given power to order the purchase under sect. 3 of what has been called grey, the land outside the clearance area, that express power should be given him for that purpose, otherwise he would find himself limited by the proviso (ii) (a), because the local authority had not originally sought the power.

Therefore, coming back to the view which I intimated at an earlier stage of my judgment, that he may modify as he thinks fit, subject to this, that he cannot authorise the purchase of that which the local authority do not require otherwise than in accordance with proviso (iii), the result is that he has to take into consideration matters as they are at the time of the local inquiry. Now at the time of the local inquiry there were no houses upon the land at all. The learned Attorney-General rather appeared to concede, when the question was put to him by my Lord, that if between the date of the declaratory resolution by the local authority and the time when they proposed to make their order, the houses had been demolished, the local authority could not have made an order, notwithstanding the fact that they had declared a declaratory resolution, and it seems to me that that is a right conclusion to come to, because under sect. 1 they passed a resolution that the area is to be cleared of all buildings in accordance with the provisions. It is clear they could not order the demolition of the buildings in the area if they proceeded or intended to proceed by process of demolition rather than by purchase, because *ex hypothesi* there would be no buildings in the area to be demolished. Similarly, I do not think they could purchase the land which is said to be for the purpose of securing the demolition of the buildings thereon—there would be no such buildings to be demolished. The same considerations which urge them to decide on the form of their order, more particularly the requirement that they shall exclude from their order buildings which are not unfit for human habitation, which they have to do even in the declaratory resolution itself, seem to me to apply equally to the modifications by the Minister and confirmation by the Minister. The whole substratum of the Act, so far as it is here relevant, contemplates the presence of buildings proper to be demolished. Where there are no buildings there can be no scope for the operation of the order.

For these reasons I have come to the conclusion that whatever may be the limitations which it imposes upon the powers of the authority, which

I have no doubt are powers which have been sought to be exercised entirely *bona fide* and in the interests of the social amenities of Nottingham—I must come to the conclusion that as the Act now stands the fact that there was no subject-matter on which the Act could operate at the time of the inquiry, prevented the Minister on those facts from confirming the order either with modification or without modification; and in those circumstances it seems to me that this appeal must fail. But I would answer one matter which the Attorney-General raised when he said that the learned judge said that the Minister at the time of his confirmation had not a set of circumstances which authorised him to act, and that there is no means in the Act by which the Minister can apprise himself of the situation as between the date of the local inquiry and the time when he seeks to act. For the present purpose it is enough to say that at the date of the local inquiry held for the purpose of transmitting the facts to him, the situation which we have considered in the present case had already come into existence, and therefore the difficult problem which the learned Attorney-General raised need not be considered.

ROMER, L.J.: The question which this court has to determine on this appeal is one of the proper construction of Part I of the Housing Act, 1930, the question being this: when the Minister of Health confirms an order made by the local authority, whether it be a clearance order or a compulsory purchase order, must he merely consider the circumstances as they existed at the date when the local authority made the order, or should he consider the circumstances as they exist and are disclosed by the report of the result of the public local inquiry in those cases where objection has been raised to the order? There is very little in the Act itself to throw light upon the solution of that question, but on the whole, I have arrived at the conclusion that the learned judge was right in adopting the latter of the two constructions and in holding that where the circumstances as they exist or are shown to exist at the date of the public local inquiry are such that the local authority would at that time have no jurisdiction to make the order, the Minister of Health himself is unable to confirm the order. It must be remembered, I think, that the object of this Act is to enable the local authority to enforce the clearance of unhealthy areas; that is the primary object of the Act, and the fact that, in the course of exercising those powers, they may become possessed of land which they can sell under sect. 5 of the Act, or which they can appropriate for any purpose for which they are authorised to acquire land, does not appear to me to throw any light on the matter which we have to decide. *Prima facie*, therefore, if at the date of an order being made, whether it be made by the local authority without confirmation, or whether it only takes effect on confirmation by the

Minister of Health, as it does in the case of clearance orders and compulsory purchase orders, there is no clearance to be effected in an unhealthy area, the order should not be made. I think, too, the fact which has been relied on strongly by SLESSER, L.J., that the Minister can in terms confirm the order with or without modification, does strongly indicate that the Minister must consider the facts that are brought to his knowledge as a result of the public local inquiry.

There are to be found in the second schedule, para. 5, certain words which have caused me some little difficulty and which I think do afford some ground, certainly at first sight, for the contention that the Minister of Health has to regard the facts, not as they exist when he is considering the matter, but as they exist when the matter is being considered by the local authority. The words are to be found in proviso (iii) to para. 5 of the second schedule ; they are in these terms :

If the Minister is of opinion that any land included by the local authority in a clearance area ought not to have been so included, he shall in confirming the order so modify it as to exclude that land

words that seem at first sight, as I say, to indicate that the Minister has nothing to do with the question of whether, by reason of a change of circumstances since the local authority took the matter in hand, the particular land would not, if the order were then made, be included in the order or the area. I think, however, the answer to that contention based upon these words, is this. It is admitted by the Attorney-General, that if, after the local authority has declared the existence of the clearance area under sect. 1 of the Act, the circumstances have changed, say, by the pulling down of the buildings on the area, so that there is no longer any object in making the clearance order or a compulsory purchase order, the local authority should not make such an order ; and it will be observed that this proviso (iii) is only dealing with the question of whether particular land ought to have been included by the local authority in a clearance area, and is not dealing with the question of whether the land, although properly included in the clearance area, ought not to have been included in the compulsory purchase order. It would therefore follow, if these words are to be treated as limiting by implication the powers of the Minister, that if he found that land had been properly included in the clearance area but, by reason of it having been cleared in the meantime, had been improperly included in the compulsory purchase order, he would have no power to interfere. That cannot be so. If the Minister of Health were to find that land, though properly included in a clearance area when the resolution establishing that area was passed, had been, owing to a change of circumstances, improperly included in the order of the local authority, it would be his bounden duty to refuse to confirm that order, in view of the admission

which the learned Attorney-General has made. I think, further, that an answer to the contention based on this proviso is to be found in the consideration to which SLESSER, L.J., has called attention. If land has been included in the clearance area which ought not to have been included because it did not come, say, within the words of sect. 1, or did not satisfy the conditions laid down by sect. 1 of the Act, the Minister obviously must exclude it from the compulsory purchase order, and it did not require any words to be inserted in a proviso to give him such a power as that. Therefore, I think we must look at the words that follow the proviso for the purposes of seeing what was the object of the legislature in inserting that proviso, and I think one finds that the object was this: that in such a case as that the Minister, though excluding certain land from the compulsory purchase order as being part of the clearance area, might let the order operate upon it as being land adjoining a clearance area or included in a clearance area under sect. 3 of the Act.

On the whole, I have come to the conclusion that the learned judge was right, and that this appeal should be dismissed.

EVE, J.: I have come to the same conclusion, and have nothing to add.

Appeal dismissed with costs. Leave to appeal to the House of Lords on payment of the respondent's costs of that appeal.

Solicitors: *Solicitor to the Ministry of Health* (for the appellant); *Torr & Co.*, agents for *J. A. Simpson, Coulby & Drabble*, Nottingham (for the respondents).

[*Reported by W. K. SCRIVENER, ESQ., Barrister-at-Law.*]

Re TEGG, PUBLIC TRUSTEE *v.* BRYANT.

[CHANCERY DIVISION (Farwell, J.), June 12, 1936.]

Will—Condition—Condition in terrorem—“Conform to the Established Church of England” —“Go to or be sent to any Roman Catholic school” —Validity.

A testator left his property in England to his trustee upon trust for conversion and to pay out of the income an annuity of £2 per week to his daughter, or if she predeceased him the capital to be divided between her children in equal shares. The following condition was added: “I desire that my daughter and any children she may bear should at all times conform to and be members of the Established Church of England and at no time may any child of hers go to or be sent to any Roman Catholic school for education and if either my daughter or her children violate this my wish in any way then all the benefits accruing to her or them under this my will shall be considered as null and void”, and there followed a gift over:—

HELD: (i) the first part of the condition requiring persons to conform to and be members of the Church of England was void for uncertainty, since it was open to grave doubt whether any particular act or omission in the future would bring about a forfeiture.

(ii) the second part of the condition requiring that “at no time may any child of hers go to or be sent to any Roman Catholic school for education” was void as a fetter upon the mother to do what she might think best for the welfare and education of her children. The condition was directed against sending the child to a Roman Catholic school and did not require that the child should not be brought up in or adopt the Roman Catholic faith: and, the mother having survived the testator, the result would be to the detriment of the mother rather than the child.

[EDITORIAL NOTE.] Since the decision in *Re Borwick* (2), the validity of the second part of this condition can hardly have been in question. The decision on the first part of the condition would seem to raise a practical difficulty in drafting such a clause, as few religious bodies now have any definite ceremony of reception or any standard of conformity. No doubt is thrown upon the case of *Hodgson v. Halford* (4), where the words were “who does not profess the Jewish religion”, and presumably these or similar words are still good.

AS TO CONDITIONS *in terrorem*, see HALSBURY, 1st Edn., Vol. 28, Wills, pp. 588-590, para. 1162; and FOR CASES, see DIGEST, Vol. 44, p. 462, No. 2825 and references there given.]

Cases referred to:

- (1) *Clavering v. Ellison* (1859), 7 H.L. Cas. 707; 44 Digest 440, 2667.
- (2) *Re Borwick*, *Borwick v. Borwick*, [1933] Ch. 657; Digest Supp.
- (3) *Re May, Eggar v. May*, [1917] 2 Ch. 126; 44 Digest 478, 2961.
- (4) *Hodgson v. Halford* (1879), 11 Ch. D. 959; 44 Digest 452, 2748.

ADJOURNED SUMMONS for the decision of questions arising on the construction of the will of Charles Tegg, who died on July 3, 1935, and also as to the validity of certain conditions directed by the testator to attach to a bequest to his daughter Gwendolyn Mary Freda Bryant.

At the time of his death the testator was in Egypt in the employment of the Cairo City Police, and by his will, which was dated Feb. 10, 1932,

he appointed the defendant Richard B. Yeates to be the sole executor and trustee thereof for the purposes of his estate and property in Egypt, and the Public Trustee in London, England, to be the sole trustee and executor of all his estate and property in England. The will was proved in England by the Public Trustee on Jan. 22, 1936. After making various dispositions with regard to his property in Egypt, the testator directed his executor and trustee of his estate in England to realise and convert into money and to invest all his estate in England and to pay from the interest arising therefrom a weekly sum of £2 a week to his said daughter. The testator further directed that in the event of his daughter being dead without any children at the time of his death, his estate in England was then to be converted into cash and the total thereof was to be divided into equal shares among such of his surviving brothers and sisters as could be found within nine calendar months after his death, and, in the event of his daughter being dead at the time of his death leaving children, he provided that such child or children of hers should inherit, in equal shares the whole of such capital of his as belonged to his English estate to the exclusion of his brothers and sisters aforesaid. He then declared as follows :

I desire that my daughter and any children she may bear should at all times conform to and be members of the Established Church of England ; and at no time may any child of hers go to or be sent to any Roman Catholic school for education ; and if either my daughter or her children violate this my wish in any way then all the benefits accruing to her or them under this my will shall be considered as null and void and the said benefits then existing and then traceable shall forthwith be divided among my brothers and sisters as aforesaid as if my daughter had predeceased me.

The testator had six brothers and sisters of whom four only were believed to have survived him, and the question asked by the summons was whether the above direction created a valid condition, on breach of which the benefits accruing to the testator's daughter, in the events which happened, and then existing and then traceable, were to be divided between the testator's brothers and sisters as mentioned in his will, or whether such direction was invalid and inoperative. In the event of the condition being held to be valid the summons asked for further directions as to the manner in which the division between the testator's brothers and sisters was to be effected.

E. M. Winterbotham, for the plaintiff, stated the facts.

Wilfrid M. Hunt, for the first defendant, the testator's daughter : The first part of this condition is void for uncertainty. It is not directed against a certain religion, but against any religion other than that of the Established Church of England, and it is impossible to say what is meant by the words "conform to and be members of the Established Church of England." Both parts of the condition are void as being against

public policy. See *Re Borwick, Borwick v. Borwick* (2). The daughter might be in a position in which, apart from any mercenary considerations, it might be her duty to bring up her children otherwise than as members of the Established Church of England, or to send them to a Roman Catholic school, and if she did either of those things she would personally lose this income. In that event she would be placed in such a delicate and impossible position that she could not do her duty properly.

W. T. Elverston for the surviving brothers and sisters of the testator : It would be improper to hold that the condition is void for uncertainty. See *Re May, Eggar v. May* (3), and *Hodgson v. Halford* (4). It would be an extraordinary result if in this court it was held that a condition that a person was not to become a member of any church but the Established Church of England was held void for uncertainty, while in other cases a condition that a person should not embrace a particular faith has been held valid and not void for uncertainty. This clause is separable into two and was intended to deal with either of the two events in respect of which provision was made by the testator, i.e., the event of the daughter surviving the testator, and the event of her being dead at the time of the testator's death leaving children alive, in which case the children would have been beneficiaries under the will, and the condition would not have affected the daughter in the performance of any duty by her. Moreover, as long as the daughter herself remains a member of the Established Church of England, there would be no breach of the condition by her if the children were sent to a Roman Catholic school by the court or by her husband. There is nothing which interferes with the duty of the daughter's husband with regard to the children. As the daughter is the only person who takes any benefit under the will in the events which have happened, the clause must be read as having no reference to the children because no benefit accrues to them under the will.

Gerald Upjohn, who appeared for the remaining defendants, was not concerned to argue this question in the summons.

FARWELL, J. : The question that I have to determine is whether the provision in the will for forfeiture of the interest given to the daughter and children of the daughter in certain events is a valid condition, or whether it is null and void.

By the will the daughter is given a weekly sum of £2 for her life. There is a provision that, in the event of her being dead on the death of her father, leaving children, it shall go to the children, and although the lady survived her father and therefore that could not take effect, it has to be noticed in considering the condition. Then follows the condition : [His Lordship read the clause of the will containing the condition],

In considering the validity of conditions of this kind there has to be

borne in mind what LORD CRANWORTH said in the House of Lords, in the case of *Clavering v. Ellison* (1), at p. 725. Dealing with the validity of a condition subsequent, he said :

I consider that, from the earliest times, one of the cardinal rules on the subject has been this : that where a vested estate is to be defeated by a condition on a contingency that is to happen afterwards, that condition must be such that the court can see from the beginning, precisely and distinctly, upon the happening of what event it was that the preceding vested estate was to determine.

I think one of the things which is most important to bear in mind in that statement of the law is, as LORD CRANWORTH points out, that the condition must be such that the court can see in what circumstances it will become operative from the beginning ; it is not enough if, at some future date when it is suggested there has been a breach of the condition, it may or may not be possible to say whether the particular act is a breach or not. There must be certainty in a condition of this kind ; that is to say, it must be a condition as to which the court can say definitely whether on the happening of some event in the future it will have or will not have been fulfilled.

In the present case the first condition which is imposed on this lady is that she herself and her children are at all times to conform to and be members of the Established Church of England. It may be—I am not deciding this—that if the testator had been content to say “should be members of the Established Church of England,” that might be a matter of some certainty, but that is not enough, because the lady and her children must “at all times conform to.” Now speaking for myself, I do not in the least know what that means. It seems to me it would be quite impossible to say, here and now, whether any particular act or omission would be enough to render this condition operative. Whether a person, merely because he has been baptised and confirmed in the Church of England, but thereafter has ceased to pay any attention to any religious services at all, can be said to conform to the Established Church of England, I have not the least idea. In my view, it is quite impossible to say that this condition fulfils what LORD CRANWORTH has said is essential, that is, that the condition must be such

that the court can see from the beginning, precisely and distinctly, upon the happening of what event it was that the preceding vested estate was to determine.

Speaking for myself, I am quite unable to say that I can see from the beginning, precisely and distinctly, upon the happening of what event it is that the preceding vested estate in this case is to determine.

In my judgment, on the language of this will, the first branch of this condition is void for uncertainty. In saying that, I am not overlooking the cases to which reference has been made, where the court has been

able to say that somewhat similar conditions were valid conditions. I know of no case in which the language is precisely the same as in this, and, in my judgment, the testator has gone out of his way to express himself in a manner which leaves it open to grave doubt as to whether any particular act or omission in the future could be said to bring about a forfeiture or not ; and that being so, it seems to me to follow that that part of the condition is void for uncertainty.

With regard to the second part of the condition, it is that

at no time may any child of hers go to or be sent to any Roman Catholic school for education.

In the events that have happened, if that condition is a valid condition and the money is forfeited, the result will be that it is the mother and not the children who will suffer. The mother will lose the £2 a week.

It is to be noticed, further, that merely sending a child to a Roman Catholic school will be sufficient to defeat the mother's interest, without the child being brought up in the Roman Catholic faith or becoming a member of the Roman Catholic Church. Now, can it be consistent with the duty that is cast upon a parent to make the best possible provision for the education of his or her children, that that parent should have held over his or her head a threat that, if a particular step is taken in the education of one of the children, it will inure to the detriment of the parent in his or her weekly income ? It may very well be that it would be the proper method of giving a proper education, having regard to the means of the parents and other circumstances, that the child should go to a Roman Catholic school, and in my judgment the attempt to fetter the discretion which lies in the mother to do what she thinks best for the welfare and education of her children is not such a condition as this court ought to enforce.

In coming to that conclusion I think I am only acting on the same principle as that which actuated BENNETT, J., in the decision to which he came in the case of *Re Borwick, Borwick v. Borwick* (2). As he points out in that case, if these children were to become wards of court and the court were to order a child to be sent to a Roman Catholic school for education, that might have the effect of defeating the mother's interest ; and in that way the court might be fettered in determining what was the most advantageous method of educating the child.

But apart from that altogether, it appears to me that, to attempt to put this sort of restraint upon the duty which falls upon a parent of making the best possible arrangement and provision for the education of her children, by seeking to deprive her of a personal benefit if she carries out what she conceives to be her duty by doing a particular thing, is not such a condition as this court ought to enforce. When one has to put it into legal language, it must be said to be void as being contrary

to public policy. In my judgment, this is a case in which the court ought to refuse to enforce a condition of this kind, and in which it ought not to enable the testator to fetter, in the way that in this case an attempt is made to fetter, the duties and the rights of the parent in determining the best method of bringing up and educating her children. I accordingly declare that both these conditions are void.

Solicitors: *Wordsworth, Marr, Johnson & Shaw* (for the plaintiff and defendants other than the surviving brothers and sisters of the testator); *Rooke & Sons* (for the defendants, the surviving brothers and sisters of the testator.)

[Reported by C. M. YOUNG, Barrister-at-Law.]

R. v. SHERIDAN.

[COURT OF CRIMINAL APPEAL (Lord Hewart, L.C.J., Humphreys and Hilbery, JJ.), June 15, 29, 1936.]

Criminal Law—Autrefois convict—Committal for trial after adjudication—No sentence—Criminal Justice Act, 1925, (c. 86), s. 24.

The appellant was charged at a Petty Sessional Court with an offence under the Debtors Act, 1869, s. 13, and elected to be tried summarily. He pleaded not guilty. The justices announced at the close of the case that they found the appellant guilty but did not sentence him. Upon hearing evidence as to his antecedents they stated that they would commit him for trial to Quarter Sessions. The appellant was remanded, and on the remand another charge was added and he was committed for trial on both charges. At the appellant's trial at Quarter Sessions, his counsel, in answer to the first charge, raised a plea of *autrefois convict*, which plea was overruled by the learned recorder:—

HELD: on these facts the plea of *autrefois convict* was established.

[EDITORIAL NOTE. There was an adjudication here in that the justices had pronounced a finding of guilty. It is true they had not proceeded to sentence the prisoner, but the finding of guilty was a sufficient determination of the case to support the plea of *autrefois convict*.

AS TO PLEA OF *Autrefois convict* see HALSBURY, Hailsham Edn., Vol. 9, pp. 152, 153, para. 212, and FOR CASES, see DIGEST, Vol. 14, pp. 336-349, Nos. 3550-3653].

Cases referred to:

- (1) *R. v. Blaby*, [1894] 2 Q.B. 170; 14 Digest 496, 5464.
- (2) *R. v. Miles* (1890), 24 Q.B.D. 423; 14 Digest 341, 2594.
- (3) *R. v. Hertfordshire JJ.*, [1911] 1 K.B. 612; 14 Digest 201, 1799.

APPEAL from a conviction by Southend Borough Quarter Sessions. THE facts appear in the judgment of the court read by HUMPHREYS, J.

J. E. M. Gunning, for the appellant.

Eustace Fulton, for the Crown.

HUMPHREYS, J. : The LORD CHIEF JUSTICE has asked me to read the following judgment, which is the judgment of the whole court.

The appellant was convicted at Southend Borough Quarter Sessions on both counts of an indictment, which charged him, in the first count, with obtaining goods from Dorothea Margaret Tredgett by false pretences with intent to defraud, and, in the second count, with obtaining credit to the amount of 24s, from Lilian Emily Reid Patten under false pretences or by means of fraud other than by false pretences contrary to sect. 13 of the Debtors' Act, 1869. He appealed by leave of the court against both convictions. At the hearing of the appeal, the court allowed the appeal and quashed the convictions, and we now proceed to give our reasons.

With regard to the first count, it is sufficient to say that the summing-up of the learned recorder was inadequate and unsatisfactory in many respects. In particular, there was no direction to the jury that intent to defraud was an essential part of the case to be proved by the prosecution. In the absence of any proper direction as to the necessity for the prosecution to prove an intent to defraud on the part of the accused, it is impossible to allow the conviction on that count to stand.

The objection to the conviction on the second count is of a different character. At the trial Mr. Gunning, who appeared for the appellant, raised a plea of *autrefois convict*, which was overruled by the learned recorder.

The appellant was originally charged at the Petty Sessional Court of Southend with one offence only : namely, that of obtaining credit from Mrs. Patten contrary to the Debtors' Act, 1869, s. 13. That offence being one of those specified in the Criminal Justice Act, 1925, sched. II, the appellant was addressed by the court in the terms of sect. 24 (2) of that Act, and thereupon he consented to be dealt with summarily. He pleaded not guilty. Evidence was called for the police, who were the prosecutors, and the appellant gave evidence on his own behalf. At the close of the case the justices conferred and announced that they found the appellant guilty. To assist the court on the question of sentence, the only matter remaining to be dealt with, a police officer then proved certain previous convictions against the appellant, whereupon the justices announced that they would not deal with the case, but would commit the appellant for trial at Quarter Sessions and remanded him for a week. On the remand the charge of obtaining goods by false pretences from Mrs. Tredgett was added and the appellant was committed for trial on both charges. Upon these facts it seems to be a plain case of *autrefois convict*. The accused was convicted at Southend Petty Sessions by a court of competent jurisdiction of precisely the same offence and on precisely the same facts as were relied on in support of the second count of the indictment.

Mr. Fulton has argued that there could be no conviction such as would support a plea of *autrefois convict* unless there was also a sentence. In the judgment of this court that is not the law. In the case of *R. v. Blaby* (1) the question to be decided was the meaning to be given to the word "conviction" in a statute which provided that certain consequences should ensue on a conviction for a misdemeanour following on a previous conviction for a similar offence. It appeared from a certificate produced in that case that the prisoner had been convicted on a previous occasion, but that no judgment had been pronounced. It was argued for the prisoner that conviction must include judgment or sentence, but a very strong court for consideration of Crown Cases Reserved held that the word "conviction" in such a connection merely referred to a plea of guilty by the accused or the finding of a verdict of guilty by a jury and HAWKINS, J., in delivering the judgment of the court, observed, at page 172 :

The intention of the legislature in this section was that the finding of the jury that the accused was guilty should be treated as a conviction ; "convicted" meant "found guilty," and the sentence was to follow on the conviction.

That decision, in our judgment, was in point in the present case, as were the judgments to the same effect in *R. v. Miles* (2), and in particular the judgment of CHARLES, J. Our attention has also been directed to *R. v. Hertfordshire JJ.* (3). In that case, a defendant charged with an indictable offence, having consented to the charge being dealt with summarily, it appeared to the justices at the close of the evidence that the case had assumed such a serious aspect by reason of a conflict of evidence as to an alibi, that it would not be right for them to deal with it, and they accordingly committed the defendant for trial. It was held, *inter alia*, by a Divisional Court that the justices, by embarking on a summary trial of the charge, were not thereby deprived of their power to commit the defendant for trial. We entertain no doubt at all that that case was rightly decided, but it is to be observed that there was in that case no adjudication on the charge by the justices, and in the course of his judgment PICKFORD, J., put the present case when he observed as follows, at page 622 :

Undoubtedly if the justices had proceeded to adjudicate on the case either by convicting or by acquitting the defendant, that would have afforded ground for a good plea to the indictment.

In our opinion the present is a case where the justices proceeded to adjudicate by convicting the defendant and accordingly the plea of *autrefois convict* is established.

Some comment was made in the course of the arguments on the *dictum* of AVORY, J., in the *Hertfordshire Justices'* case (3) as to the right of justices to inquire into the character and antecedents of a person charged

before deciding to convict. The language of the Summary Jurisdiction Act, 1879, s. 12, the statute then in force, is somewhat different from that used in the Criminal Justice Act, 1925, s. 24. A consideration of subsect. 1 of the latter section makes it plain, in our view, that justices are now required, as a preliminary to dealing summarily with an indictable offence, to hear and to take into consideration certain matters specified in the section, one of them being the character and antecedents of the accused, to enable them to decide whether they ought to deal with the case summarily. Such a course does not appear to involve any unfairness to the accused. Presumably if the character of the accused as stated to them appeared to be bad, the justices would refuse to deal with the case summarily, and, if a *prima facie* case was proved, they would commit the accused for trial. On the other hand, if the character given to the accused was good, no harm would be done by the justices having heard that fact stated early in the proceedings.

Solicitors : *Registrar of the Court of Criminal Appeal* (for the appellant) ;
R. A. Shorter (for the Crown).

[Reported by H. P. LANSDALE-RUTHVEN, Esq., Barrister-at-Law.]

CLIFTON (otherwise PACKE) v. CLIFTON.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Bucknill, J.), **May 26, 1936.**]

Divorce—Nullity—Decree against male respondent—Maintenance and variation of settlements—Short cohabitation.

The petitioner married the respondent on June 2, 1934, and obtained a *decree nisi* of nullity in July, 1935. Petitions for maintenance and variation of the marriage settlement were duly lodged. The variation asked for by both parties was that the rights, powers and interests of each party in the other's fund should be extinguished. The registrar reported in these terms and also reported that no maintenance should be granted, as the position was that the male party would have about £750 a year and the female party about £420 a year, and that disclosed no case for an order for maintenance :—

HELD : the report of the registrar should be confirmed. Having regard to the short duration of the cohabitation, this was not a case where the sense of propriety and moral justice requires some provision by way of maintenance.

[**EDITORIAL NOTE.** The court has power to vary settlements after a nullity decree, but a marriage settlement appears to be avoided by the decree itself. The principle upon which maintenance is granted in nullity cases was stated in *Gardiner (orse. Phillips) v. Gardiner* (1). The present case appears to be the first in which maintenance has been refused, and the ground for such refusal is the short duration of the cohabitation.

AS TO MAINTENANCE IN NULLITY CASES, see HALSBURY, Hailsham Edn., Vol. 10, p. 788, para. 1247 ; and FOR CASES, see DIGEST, Vol. 27, p. 505, Nos. 5397-5399.]

Cases referred to :

- (1) *Gardiner (orse. Phillips) v. Gardiner* (1920), 36 T.L.R. 294 ; 27 Digest 505, 5399.
- (2) *Nepean (orse. Lee-Warner) v. Nepean*, [1925] P. 97 ; 27 Digest 519, 5610.
- (3) *Gullan v. Gullan (orse. Goodwin)*, [1913] P. 160 ; 27 Digest 509, 5469.
- (4) *Dormer (orse. Ward) v. Ward*, [1901] P. 20 ; 27 Digest 521, 5629.

MOTION to vary report of the registrar on petitions for maintenance and variation of settlement. Such petitions having been presented after a decree of nullity on the ground of the male party's impotence, the registrar had reported that the settlements should be varied by the mutual extinguishing of each party's interest in the other's fund and that both funds should be freed from the trusts of the settlement. He refused to make an order for maintenance. By reason of the respective incomes of the petitioner and the respondent, no order could be made in favour of the petitioner unless there were taken into account covenants by the respondent's father to pay in consideration of the marriage annuities amounting to £800.

Noel Middleton, K.C., for the petitioner : An order for maintenance should be made. The registrar was wrong in providing that the respondent's father should be freed from his liability under the covenant of the settlement because the consideration of the marriage had failed. The court could vary in favour of a petitioner a settlement made by a third party. The principles upon which maintenance was allotted in nullity cases were illustrated in *Nepean (orse. Lee-Warner) v. Nepean* (2), *Gullan v. Gullan (orse. Goodwin)* (3), and *Gardiner (orse. Phillips) v. Gardiner* (1).

W. N. Stable, K.C., and *Hon. Victor Russell*, for the respondent : The report should be confirmed. The covenants entered into by the respondent's father depended for their validity upon the validity of the marriage. The covenants therefore failed with the marriage and the respondent's father's liability under the settlement necessarily terminated unless the court thought fit to keep it alive : *Dormer (orse. Ward) v. Ward* (4). Although the petitioner's cohabitation with the respondent had been of only a few month's duration, the petitioner was seeking to impose on the respondent's father a continuing liability to support her. In the circumstances it was proper to extinguish the petitioner's interest in the respondent's fund and it would be inequitable that the respondent's father's liability should be allowed to continue.

J. B. Blagden for the respondent's father adopted the same argument.

Hon. J. T. Roberts for the trustees.

BUCKNILL, J. : This motion comes before the court in these circumstances. The petitioner married the respondent on June 2, 1934, and obtained a *decree nisi* of nullity of the marriage in July, 1935, just

thirteen months after the ceremony. In due course a petition was lodged by her for maintenance, and also a petition that the marriage settlement should be varied. The financial position of the parties is this. There was a pre-nuptial settlement under which the respondent's father, Colonel Clifton, made a personal covenant to pay £400 per annum to his son, the respondent, during the joint lives of himself and the respondent, and also brought in certain securities which secured the payment of £400 a year to the respondent during his life. In addition, the respondent, who is an officer in His Majesty's army, has pay amounting to about £180 a year, and he has certain rights under a discretionary trust which bring him in £580 a year. That means that, apart from moneys which he has received from his father under these covenants, his income is about £760 a year. The wife, the petitioner, on the other hand has an income of about £420 a year.

When the petition for maintenance came before the registrar there was also the petition for variation of settlement and the learned registrar reported that the powers and interests of the respondent in the petitioner's fund should be extinguished. The respondent asked that all rights, powers and interests of the petitioner in the respondent's fund should be extinguished. The learned registrar in his report has reported that the settlement should be varied in the terms of the prayers of the petition and the answer and he reported that no maintenance should be ordered as against the respondent, mainly on the ground that if you extinguish the rights of the parties under the covenant of Colonel Clifton, the father, and in respect of the securities which Colonel Clifton brought into the settlement, extinguishing that £800 a year, it leaves the parties in this position, that the husband has about £750 a year and the wife about £420, and on those figures there was no case for maintenance made out. The answer of the wife to that, as I understand it, is this, that this is a case in which maintenance ought to be ordered for the wife, and, if that is right, this court ought to enforce as against Colonel Clifton powers which the court has of making him make some provision under these covenants and under this trust, although, apart from the powers of the court to do that, Colonel Clifton's liabilities are now extinguished, because the marriage has been annulled.

It seems to me that the real question which I have to decide in this case is whether, to quote the words of LORD MERRIVALE (then SIR HENRY DUKE, P.) in the case of *Gardiner v. Gardiner* (1), at p. 295 :

an appeal for permanent maintenance after a decree of nullity is not an appeal to a set of fixed principles, but one to the sense of propriety and moral justice of the court.

It is very clear, as stated in the vigorous argument put forward on behalf of Colonel Clifton, that he no doubt made this provision for his son,

thinking that there was going to be a valid marriage and with the natural hopes that that entails. In fact no valid marriage has been consummated and the ceremony has become null and void. Is there any reason why the wife in this case should receive maintenance at the hands of her husband? The parties were only married for a year and the marriage has been annulled on the ground of the incapacity of the husband. The case seems to me to be entirely different from the case of divorce where there is fault on the part of the husband. The cases to which I was referred by Mr. Middleton are all cases in which quite a substantial period of time had elapsed between the marriage and the decree of nullity. In *Nepean's* case (2), I see it was eight years, and in *Gullan's* case (3), it was ten years, and in *Gardiner's* case (1), I see it was eight years. In this case I myself cannot see that the registrar has gone wrong in any way at all, nor can I see that the wife has really made out any case of maintenance to be granted to her, and I think that the report of the learned registrar is right, both in respect of the petition to vary and of the petition for maintenance and should be confirmed.

There is just one other point. The learned registrar has recommended that the wife's costs of the petition for maintenance should not be taxed against the husband. Mr. Stable on behalf of the husband, I think very properly, has consented that the report should be varied in that respect. Therefore, I vary the report by ordering that the petitioner's costs should be taxed against the husband, both before the learned registrar and on this motion.

Solicitors: *Withers & Co.* (for the petitioner); *Dawson & Co.* (for the respondent and Colonel Clifton); *Norton, Rose, Greenwell & Co.* (for the trustees).

[Reported by J. F. COMPTON MILLER, ESQ., Barrister-at-Law.]

WESTMINSTER BANK, LTD. *v.* IMPERIAL AIRWAYS, LTD.

[KING'S BENCH DIVISION (Lewis, J.), May 26, 27, June 29, 1936.]

Carriers—International air carriage—Consignment note—Incorporation of rules of Convention—Commencement of air carriage—Registered goods—Carriage by Air Act, 1932 (c. 36), sched. 1, arts. 8, 22 (2).

The defendants received bar gold valued at £9,138 for transport from London to Paris. The gold was removed by motor-van to Croydon, where it was placed in the strong room of the aerodrome. On the following morning the door of the strong room was found open and the gold was missing. The consignment had the following on the back: "Carriage by air: The general conditions of carriage of goods are applicable to both internal and international carriage. These general conditions are based upon the Convention of Warsaw of Oct. 12, 1929, in so far as concerns international carriage within the special meaning of the said Convention." In an action to recover the value of the gold:—

HELD: (i) the carriage by air of the bar gold had commenced.

(ii) the statement on the back of the consignment note was not a sufficient statement that the carriage was subject to the rules relating to liability established by the convention.

(iii) upon the facts the plaintiffs had not made a special declaration of value nor paid any supplementary rate within Carriage by Air Act, 1932, sched. 1, art. 22 (2), and no question of the additional liability of the carrier under that article could arise.

EDITORIAL NOTE. The carriage of passengers, passengers' luggage and goods by air is regulated so far as international carriage is concerned by the convention referred to in this case and which is given effect to by the Carriage by Air Act, 1932. The only point for which this case is an authority is the form of the consignment in order to comply with art. 8 of the convention. The question of the carriage of registered luggage under art. 22 (2) is also discussed, but this is possibly open to the objection that it is only *obiter*. It seems clear as a result of this case that the consignment note must contain a clear statement that the carriage is subject to the rules relating to liability established by this convention; and in the future this statement will, no doubt, follow exactly the words of art. 8 (g).

AS TO INTERNATIONAL CARRIAGE BY AIR, see CARRIAGE BY AIR ACT, 1932, HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 25, p. 865.]

TRIAL OF PRELIMINARY ISSUES under an order made by MACKINNON, J., dated Mar. 25, 1936, and which is set out in the judgment. The facts shortly stated are that on Mar. 5, 1935, the defendants sent a van to the plaintiffs' office in Lothbury to collect a consignment of bar gold valued at £9,138 13s. 6d., for transport by air and delivery to the Westminster Foreign Bank, Paris. One of the defendants' usual printed consignment notes was duly filled in. On arrival at the airport at Croydon the box was weighed and put in the strong room. The next morning the door of the strong room was found open and the gold missing. The plaintiffs in this action claimed the value of the consignment. The pleadings are fully set out in the judgment, together with the relevant articles from the Carriage by Air Act, 1932.

H. U. Willink, K.C., and *W. L. McNair* for the plaintiffs: It is common

ground that the contract in the consignment note is subject to the Carriage by Air Act, 1932. That note does not contain a statement that the carriage is subject to the rules relating to liability established by the convention, which is obligatory. The document is, therefore, irregular, because it does not contain that necessary statement, and the carriers are liable if the goods are lost during the carriage. Carriage by air comprises the period that the goods are in the custody of the carriers. There is no allegation in the pleadings that the loss did not occur during carriage by air. Anyhow the gold was lost at the aerodrome and consequently the defendants are liable. As to the limitation of liability, the rate charged on the declared value for the consignment of bullion amounted to a supplementary payment as provided for in the general conditions of carriage of goods. The defendants are therefore not entitled to rely upon the limitation of that liability, contained in art. 20 (2) (1). On the contrary, they are liable under art. 20, para. 2 (2), to pay the full declared value of the consignment.

A. T. Miller, K.C. and *H. G. Robertson* for the defendants: The forms of the various documents are not the children of the Imperial Airways, but are the result of international agreement. By art. 33 of the schedule of the Act nothing shall prevent the carrier from making regulations which do not conflict with the law. The company may refuse to enter into any contract. There is no statutory right that the consignor shall have unlimited insurance, even by payment of a supplementary fee, which it is not admitted was done in this case. The company say if you want complete cover you must insure. The published tariff rates issued by the company give express notice of special rates for insurance. The rate for carriage charged was the ordinary competitive rate for the class of merchandise carried. It was in no sense a supplementary payment. The consignment note is a business document and should be so read. It satisfies the requirements of the Act. Both parties to the contract are presumed to know the law and persons contracting for international carriage must be presumed to have read the convention.

LEWIS, J.: In this case the plaintiffs, the Westminster Bank Ltd., sue the defendants, the Imperial Airways, Ltd., in respect of the loss of three bars of gold, which were consigned to the defendants for carriage from London to Paris on Mar. 5, 1935. The plaintiffs by their points of claim allege that these three bars of gold were delivered to the defendants to be kept safely and carried by them for reward upon the terms of a consignment note dated Mar. 5, 1935. The value of the goods is admitted to be £9,138 13s. 6d. The points of claim further allege that it was the duty of the defendants in accordance with the contract contained in or evidenced by the said consignment note, or alternatively as common carriers, to keep the goods safely and to carry

them to Paris, and that the defendants have wholly failed to deliver the said goods at Paris, whereby the plaintiffs have lost the value of the said goods. Alternatively the plaintiffs say that the contract contained in the consignment note was subject to the Carriage by Air Act, 1932, and that by the terms of that Act it was incumbent upon the defendants to set out in their consignment note a statement that the carriage of the three bars of gold was subject to the rules relating to liability established by the Warsaw Convention set out in sched. 1 of the Act. The plaintiffs say that the consignment note contained no such statement, and that in the premises the defendants are liable for the loss of the said goods. In the further alternative the plaintiffs contend that the defendants were negligent in the custody and care of the said goods by reason whereof the said goods were on or about Mar. 5, 1935, stolen from the defendants' premises at Croydon Aerodrome, with a resultant loss to the plaintiffs. In the further alternative the plaintiffs rely upon arts. 18 (1) and (2) and ~~25~~ 25 of chapter 3 of the first schedule to the said Act and say that the loss of the goods was caused by the wilful misconduct of the defendants or by such default which by English law is consistent with wilful misconduct.

The defendants by their points of defence deny that they were common carriers and allege that by the said consignment note the contract therein contained, namely, the contract of carriage, was expressed to be subject to the general conditions of carriage of goods therein referred to and contend that the said general conditions provided amongst other things that the defendants are not liable for the loss of goods if they prove that they or their agents have taken all necessary measures to avoid the damage, or that it was impossible for them to take such measures, and that the liability of the defendants, if any, is limited to the sum of 250 French francs per kilogram. They contend that the contract is subject to the Carriage by Air Act, 1932, and plead that by the convention set out in sched. 1 of the Act, the carrier is not liable if he proves that he and his agents have taken all necessary measures to prevent such damage and that it was impossible for him or them to take such measures, and in the carriage of goods the liability of the carrier is limited to a sum of 250 French francs per kilogram. They admit that on the night of Mar. 5-6, 1935, the said goods were stolen from a strong room in a building at the Croydon Airport, known as the Administration Block. The defendants then proceed to set out certain facts to show that they took all necessary measures to prevent the loss of the said goods or that it was impossible for them to take such measures.

In reply the plaintiffs allege that a special declaration was made of the value of the said goods at the time of the delivery of the said goods to the defendants and a supplementary payment made, which facts the plaintiffs contend deprive the defendants of the limitation of liability

contained in art. 20, para. (2) (1) of the general conditions and renders the defendants liable to pay a sum not exceeding the declared value, unless it is proved by the defendants that that sum is greater than the actual value to the consignor at the time of the delivery. The plaintiffs further allege that in view of the fact that a special declaration and a supplementary payment were made the defendants were liable under the Carriage by Air Act, 1932, sched. 1, art. 22 (2). The matter comes before me by reason of an order made by MACKINNON, J., on Mar. 25, 1936, by which it was ordered that the following questions arising in the action should be tried by way of preliminary issues before the other questions arising in the action. The questions contained in the order of MACKINNON, J. were : (1) whether the consignment note referred to in the pleadings satisfy the requirements of art. 8 (g) of the convention set out in the Carriage by Air Act, 1932 ? (2) if not, whether the defendants are liable to the plaintiffs under the said Act and schedule ? (3) if the consignment note does satisfy the requirements of art. 8 (g) of the convention whether the defendants' liability is limited to 250 francs per kilogram ?

Before the matter came before me it was agreed between the solicitors for the plaintiffs and the defendants that the following further issue should be tried by me, namely : (4) whether there was within the meaning of the Carriage by Air Act, 1932, sched. 1, art. 22 (2) a special declaration of value and a supplementary payment made as alleged in the reply, and, if so, what is the effect thereof in law ?

When the matter came before me, it was agreed that the second question contained in the order of MACKINNON, J., should be varied to read—" If not, whether the defendants have any defence to the plaintiffs' claim ? " And I was also asked by consent to consider the question : " As to what the measure of damages, if any, was applicable in this case ? "

On Oct. 12, 1929, there was signed at Warsaw on behalf of His Majesty's Government, a convention for the unification of certain rules relating to international carriage. In 1931 the International Air Traffic Association, of which association the defendants in this case were members, agreed on general conditions. On July 12, 1932, the Carriage by Air Act was passed, which enacted that the provisions of the afore-said convention which are set out in the first schedule to the Act should come into force, and have the force of law in the United Kingdom in relation to the carriage by air to which the convention applied. For the purposes of this case the effect of the Carriage by Air Act, 1932, is to give the force of law to the Warsaw Convention to the contract in question in this case, which was a contract for international carriage. It is necessary to refer to certain articles of the convention which forms the first schedule to the Carriage by Air Act, 1932. Art. 2 defines " international carriage." I need not refer further to it, as it is conceded

that in this case the carriage was international carriage. Art. 3, which relates to passenger tickets, contains in 1 (e) an enactment that the passenger ticket shall contain the following particulars, namely, that the carriage is subject to the rules relating to liability established by this convention.

By art. 4 (3) (h) a similar enactment is made with regard to the luggage ticket.

Art. 5, which is the first article of chap. 3 of sched. 1 and is headed "Air Consignment Note," reads as follows :—

(1) Every carrier of goods has the right to require the consignor to make out and hand over to him a document called an "Air Consignment Note"; every consignor has the right to require the carrier to accept this document.

(2) The absence, irregularity or loss of this document does not affect the existence or the validity of the contract of carriage which shall, subject to the provisions of art. 9, be none the less governed by the rules of this convention.

Art. 8 is as follows :

The air consignment note shall contain the following particulars.

There then follow certain particulars which are to be contained in the consignment note lettered from (a) to (q). (q) reads :

A statement that the carriage is subject to the rules relating to liability established by this convention.

This latter provision corresponds to the provision laid down with regard to the passenger ticket and the luggage ticket.

Art. 9 reads :

If the carrier accepts goods without an air consignment note having been made out, or if the air consignment note does not contain all the particulars set out in art. 8 (a) to (i) inclusive and (q), the carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability.

In chapter 3 of the schedule the liability of the carrier is dealt with. By art. 18 it is enacted as follows :

(1) The carrier is liable for damage sustained in the event of the destruction or loss of, or of damage to any registered luggage or any goods, if the occurrence which caused the damage so sustained took place during the carriage by air.

(2) The carriage by air within the meaning of the preceding paragraph comprises the period during which the luggage or goods are in charge of the carrier, whether in an aerodrome or on board an aircraft, or, in the case of a landing outside an aerodrome, in any place whatsoever.

It was suggested at one time by Mr. Miller, who appeared for the defendants, that the damage sustained by the plaintiffs in this case did not take place during the carriage by air. This point was but faintly argued, and in view of the fact that by their points of defence the defendants admit that the goods were stolen from a strong room in a building at Croydon Airport and that when so stolen they were in charge

of the defendants, it seems to me impossible successfully to contend that at the time when the loss was sustained the carriage by air had not begun.

By art. 20, it is provided as follows :

(1) The carrier is not liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures.

Art. 22 (2) provides :

In the carriage of registered luggage and of goods, the liability of the carrier is limited to a sum of 250 francs per kilogram, unless the consignor has made, at the time when the package was handed over to the carrier, a special declaration of the value at delivery and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless he proves that that sum is greater than the actual value to the consignor at delivery.

Art. 23 provides :

Any provision tending to relieve the carrier of liability or to fix a lower limit than that which is laid down in this convention shall be null and void, but the nullity of any such provision does not involve the nullity of the whole contract, which shall remain subject to the provisions of this convention.

Art. 25 (1) provides :

The carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability, if the damage is caused by his wilful misconduct or by such default on his part as, in accordance with the law of the court seised of the case, is considered to be equivalent to wilful misconduct.

In chapter 5 of the schedule under the heading "General and Final Provisions," there appears art. 33, which reads as follows :

Nothing contained in this convention shall prevent the carrier either from refusing to enter into any contract of carriage, or from making regulations which do not conflict with the provisions of this convention.

The effect of the articles above-mentioned is, in my opinion, *prima facie*, to render the carrier, the defendants in this case, liable for any loss of goods caused or occasioned during carriage by air. The carrier, however, is entitled to escape that liability if he can satisfy the provisions of art. 20 (1). By art. 22, there is a further limitation upon the liability of the carrier in so far as amount is concerned, namely, that in the case of the carriage of goods the carrier's liability is limited to the sum of 250 francs per kilogram. This limitation of liability by the carrier can, however, be avoided if the consignor makes the special declaration and pays the supplementary sum referred to in that article. In no way can the carrier limit his liability further (see art. 23). Arts. 20 and 22 are, in my opinion, articles which exclude or limit the liability of the carrier, and in order to enable the carrier to so exclude or limit his liability he must comply with art. 8 (a) to (i) inclusive and (g) (see art. 9). The

position, therefore, in my opinion, is this—that if the carrier has not complied with art. 8 (a) to (i) inclusive and (q), art. 18 defines the liability of the carrier and the carrier cannot take advantage of any of the exclusions or limitations of his liability, for example, those set out in arts. 20 and 22. The first question, therefore, which I have to answer depends upon whether or not the defendants in this case complied with the terms of art. 8 of the schedule.

The only reference which appears on the consignment note to the convention, which, as I have said, appears as the first schedule to the Carriage by Air Act, 1932, is a statement on the back of the consignment note to this effect :

Carriage by air : The general conditions of carriage of goods are applicable to both internal and international carriage. These general conditions are based upon the Convention of Warsaw of Oct. 12, 1929, in so far as concerns international carriage within the special meaning of the said Convention.

It was contended by the plaintiffs that this reference is not a compliance with the Carriage by Air Act, 1932, sched. 1, art. 8, which enacts that the air consignment note shall contain the following particulars :

(q) a statement that the carriage is subject to the rules relating to liability established by this convention.

In my opinion, a statement that the carriage is subject to certain general conditions of carriage of goods which general conditions are based upon the convention is not a statement that the carriage is subject to the rules relating to liability established by the convention. In my opinion it is impossible to interpret the statement on the consignment note as being a statement that the carriage is subject to the rules relating to liability established by the convention. To say that certain conditions are applicable to the carriage which said conditions are based upon the convention is, in my opinion, a very different matter from saying that the convention governs the carriage. Mr. Miller, for the defendants, argued that the statement on the consignment note was a sufficient compliance with the Act and based his argument in support of this contention upon three matters, namely : (1) that the consignment note was a business document and should therefore be construed liberally and in a commercial sense ; (2) that both the parties to the contract knew the law ; and (3) that the consignment note was applicable, both to internal and international carriage. I am unable to accede to any of these arguments. The direction given in the schedule is a statutory obligation imposed upon the carrier to incorporate in his consignment note a perfectly simple statement, namely,

that the carriage is subject to the rules relating to liability established by this convention,

and I am unable, in spite of the arguments of Mr. Miller, to hold that

the statement on the back of the consignment note is a compliance with that statutory obligation. The general conditions of carriage of goods referred to in the consignment note are contained in a paper-covered book, entitled "Agreement concerning the contract of carriage by air," and I was informed and I accept it as a fact, that these general conditions of carriage of passengers and baggage are posted up at the offices of the Imperial Airways. It is to be observed that in those general conditions of carriage, there appears the following :

Chapter 2, art. 4 (5). So far as concerns international carriage, as defined by art. 1, para. 2, the air consignment note shall contain in addition the following particulars inserted by the carrier: (b) a statement that the carriage is subject to the rules relating to liability set out in the convention of Warsaw of Oct. 12, 1929, and upon which these conditions are based.

Those responsible for the preparation of the consignment note, instead of having a plain statement in accordance with the Act printed on the consignment note, have chosen to set out that the carriage is subject, not to the rules established by the convention, but to certain conditions which it is alleged are based on those rules.

In my view, therefore, the answer to the first question is that the consignment note does not satisfy the requirements of art. 8 (g) of the convention.

It was stated by counsel on both sides that if the answer to the first question was in the negative the other questions really did not arise, but I propose quite shortly to deal with those other questions in their order.

The second question as varied is: "If not, whether the defendants have any defence to the plaintiffs' claim?" I am of opinion that they have not and that the measure of damages applicable to the case is the value to the plaintiffs of the bars of gold which value it is agreed was £9,138 13s. 6d. In view of my answer to question 1, question 3 does not arise.

With regard to question 4, in view of my answer to question 1, this does not arise, but I heard considerable argument with regard to the meaning of a special declaration of value and a supplementary payment. Undoubtedly the plaintiffs made a declaration of the value of the goods. On the consignment note there appears under the column headed "Quality and nature of goods," "Bar gold £9,000," and under the column headed: "Value for Customs," the same sterling figure appears. There is in the consignment note a space for the insertion of a figure for the value for insurance. The space is labelled "Special declaration of value for insurance by the carrier." That space was not filled in. Adjacent to that space there is another space labelled "Special declaration of value at delivery." That space was blacked out and evidence was called before me to the effect that Imperial Airways refused to

accept any special declaration of value at delivery. The instructions to the traffic staff issued by the Imperial Airways contain the following :

Declaration of value. (a) For insurance. (b) At delivery. As with the baggage check consignments will not be accepted for carriage if this latter space is completed.

It seems to me, therefore, clear that not only was no special declaration of value at delivery made, but that if in fact such a special declaration had been made, the consignment in this case would not have been accepted. I do not think it is necessary for me to inquire as to the effect of the carrier's refusal to accept such a special declaration. Suffice it to say that no special declaration was in fact made. Nor do I think that even if a special declaration was made that any supplementary payment was made by the consignor. Imperial Airways carry at certain rates. There is what I may term the ordinary rate for general merchandise ; there is also a rate applicable at the company's option to furs, skins, other valuable goods, works of art, etc. These rates are *ad valorem* rates. Similarly there are *ad valorem* rates for the carriage of gold bullion and specie, and Imperial Airways announce that special rates can be had on application for the carriage of bullion for destinations in Europe. The goods in question in this case were bars of gold, and in order to assess the amount to be paid, it was necessary, as the rate was an *ad valorem* rate, to insert the value of the gold, which accounts, in my opinion, for the insertion of the words " Value £9,000 " in the column headed : " Quality and nature of goods." Undoubtedly as the goods in question were bullion a higher rate was paid than the rate for ordinary merchandise, but I do not think that a supplementary payment was made. In my opinion the word " supplementary " implies some payment in addition to the ordinary rate at which the goods in question are carried. Here the only rate at which bullion is carried is the *ad valorem* rate which in fact was paid. What was in fact paid was a rate which was the usual rate for the carriage of bullion, but which was a higher rate than that for ordinary merchandise, and I am unable to accede to the argument that because this rate was a rate higher than the rate for ordinary merchandise that the payment of that rate was a supplementary payment.

The costs of these proceedings must be paid by the defendants to the plaintiffs.

Solicitors : *William A. Crump & Son* (for the plaintiffs) ; *Beaumont & Son* (for the defendants).

[Reported by C. ST. J. NICHOLSON, ESQ., Barrister-at-Law.]

Re CROCKER.

[CHANCERY DIVISION (Clauson, J.), May 26, 27, 1936.]

Solicitors—Production of documents—Document relating to action brought in name of applicant—Agreement giving insurance company absolute conduct and control of proceedings.

A motorist was involved in a collision in which his passenger was injured. The passenger brought an action against the motorist for damages for negligence. The motorist was insured against third party risks and by a condition in this policy the insurance company "shall if and so long as it so desires, have absolute conduct and control of all or any proceedings against the insured." The insurance company duly instructed a firm of solicitors to act for the motorist in the action brought against him. In that action negligence was admitted and the passenger was awarded damages. The motorist asserted that he had not authorised the insurance company to admit negligence, and he applied to the solicitors for production for his inspection of the documents relating to the trial. The solicitors refused to produce the documents on the ground that they belonged to the insurance company. The motorist thereupon took out a summons asking, *inter alia*, for an order for production.

HELD: there was nothing in the condition in the insurance policy, that the insurance company were to have the conduct and control of all proceedings, which took away the motorist's right to see the documents relating to the action in which he was a party and an order for production should be made.

[EDITORIAL NOTE.] The usual application is for the delivery up of papers from the solicitor to the client. Here the client of the solicitors was the insurance company and the application was therefore only for production, and this seems to have been the more necessary since the insurance company were not parties to the application. There are many instances in which discovery has been granted against a non-party in form who is in substance a party; but, of course, there was no question of discovery here as the action had terminated and the cases can only be treated as analogous. It seems clear, too, that the applicant must for such purposes be treated as the client, since the solicitors brought the action in his name, and the insurance company were not, in fact, parties to the action. The condition in question has also been considered as to how far it limits the power of the insurance company to avoid a policy by reason of some fact that comes to its knowledge in prosecuting an action on behalf of the assured, and as to how far its continuing to prosecute such an action prevents a subsequent avoidance: see *Etchells Congdon & Muir, Ltd. v. Eagle Star & British Dominions Insce. Co.* (1928), 72 Sol. Jo. 242.

AS TO SUMMARY JURISDICTION TO ORDER DELIVERY OF PAPERS, see HALSBURY, 1st. Edn., Vol. 26, Solicitors, pp. 840, 841, para. 1364; and FOR CASES, see DIGEST, Vol. 42, pp. 326-329, Nos. 3651-3709; and FOR DISCOVERY AGAINST NON-PARTY IN FORM BUT PARTY IN SUBSTANCE, see HALSBURY, Hailsham Edn., Vol. 10, pp. 349, 350, para. 420; and FOR CASES, see DIGEST, Vol. 18, pp. 55-59, Nos. 129-160.]

Cases referred to:

- (1) *Walsh v. Julius White & Bywaters* (1927), "The Times," July 13.
- (2) *Adams v. London Improved Motor Coach Builders*, [1921] 1 K.B. 495; Digest Supp.

(3) *Ex p. Cobeldick* (1883), 12 Q.B.D. 149; Digest Supp.

(4) *Re Hawkes, Ackerman v. Lockhart*, [1898] 2 Ch. 1; 18 Digest 114, 656.

SUMMONS taken out by William Groom asking that the respondents, William Charles Crocker, a firm of solicitors, who had acted as such in an action, *Groom v. Tear Brothers & Groom*, brought against the applicant and others, should (a) deliver up to the applicant; (b) produce for his inspection, all the documents relating to the action in their possession, custody or control.

The applicant was, on Aug. 11, 1934, driving a motor car in which Aubrey Groom, the plaintiff in the action, was a passenger. As the result of a collision between the applicant's car and a motor lorry driven by or on behalf of Tear Brothers, Aubrey Groom was injured and brought an action for damages for negligence against Tear Brothers and the applicant, as the result of which he was awarded damages on admissions of negligence by both defendants. The applicant was insured against third party risks with National Farmers' Union Mutual Insurance Society, Ltd., and the policy issued by them contained the following condition:

2. The insured shall not incur any expense whether in respect of litigation or otherwise, or make any payment, settlement, arrangement or admission of liability in respect of any death, injury, loss or damage for which the society may be liable, under this policy, without the written authority of the society except as provided for herein; but the society shall if and so long as it so desires, have absolute conduct and control of all or any proceedings against the insured (including arbitration and negotiations) and shall be entitled to use the name of the insured to enforce for the benefit of the society any order made for costs or otherwise, or to make or defend any claim for indemnity or damage against third parties.

In pursuance of that condition the insurance company acted for the applicant in the proceedings brought against him by Aubrey Groom, and instructed the respondents to act therein as solicitors, and the applicant said that he knew nothing of the judgment against him until he read of it in a newspaper, and that he had never, in fact, authorised the insurance company to admit negligence by him. The applicant thereupon applied to the respondents, the solicitors in the action, for production of the documents relating to the action, and on the refusal of the respondents to comply with his request, he took out the present summons.

Fergus D. Morton, K.C., and *Gerald Gardiner* for the applicant: There is full jurisdiction in the court to make the order asked for either under the court's general jurisdiction, which has been extended by the Solicitors Act, 1932, s. 64 (1), or under the Solicitors Act, 1843, s. 37, the procedure under which is regulated by R.S.C., Ord. 55, r. 2 (15). That rule refers to the delivery up of documents. *A fortiori* there must be jurisdiction to make an order for inspection. Although the respondents were selected as solicitors by the insurance company they were for the purposes of the

action, acting as the solicitors of the applicant: see *Walsh v. Julius White & Bywaters* (1) and *Adams v. London Improved Motor Coach Builders* (2).

H. D. Samuels, K.C., and *J. G. Strangman* for the respondents: It is not suggested that the court has no jurisdiction to deal with the matter, but in dealing with an application under its summary jurisdiction the court should be very careful before making an order, and this is not a proper case for it to do so; see *Ex p. Cobeldick* (3). The insurance company may well object to the applicant seeing these documents and the insurance company is not before the court. Moreover it is not usual for an application of this kind to be granted except in pending litigation in order to protect the client in such litigation: see *Re Hawkes, Ackerman v. Lockhart* (4) at p. 16.

CLAUSON, J.: The insurance company have no right to interfere between the applicant and his solicitors.

H. D. Samuels, K.C.: The applicant is not entitled to rely on his right by reason of the contract between the parties. The right of the insurance company to control and conduct absolutely this litigation carries with it the right to control all the documents relating to the litigation. Although the insurance company were not parties to the action, they instructed the solicitors who were thus acting in a dual capacity, to protect their interests. That would give the insurance company, apart from contract, some control over the documents relating to the action, which belong to them and to the possession of which they are entitled.

CLAUSON, J.: The applicant, Mr. William Groom, was driving a motor car in which there was a passenger, another Mr. Groom. There was a collision between the motor car which Mr. William Groom was driving and a motor vehicle which was driven by or on behalf of a firm named Tear Brothers. Under these circumstances the passenger, Mr. Aubrey Groom, saw fit to bring an action against Mr. William Groom, and against certain others, claiming relief arising out of the injuries alleged to have been sustained by him. Mr. Groom, the present applicant, and the defendant in that action, retained as his solicitors the firm with which I am concerned in the matter in which this application is made. They acted as his solicitors in the action which, I am told, has run its course. I do not know the details of what happened but I suppose there was some judgment. Mr. Groom, the applicant, for reasons of his own—it may be that he conceives that his interests have not been properly looked after by the solicitors—is desirous of having access to the papers relating to the action which are in the custody, possession or power of his solicitors. That there are some such papers is not questioned, and Mr. Groom has taken out the present summons asking,

in the first place, for an order that all documents in the respondents' possession belonging to him shall be delivered up to him. That part of the summons has not been pressed. The part of the summons that has been pressed is the second part, which asks for an order that the respondents shall, at all reasonable times on reasonable notice, produce at 42, Gracechurch Street, in the City of London, all books, documents, papers or writings in their custody, possession or power relating to the action entitled *Groom v. Tear Brothers and Groom*, 1934, G. No. 7842, and that the applicant his solicitors and agents may be at liberty to inspect and peruse the documents so produced and to make notes of their contents and may be entitled to be supplied with copies thereof on payment therefor at the rate prescribed by R.S.C. Ord., 65, r. 27 (18).

Before considering the contentions put forward on this part of the summons, I should say this. The solicitors, whether or not they have a lien, do not seek to raise any point by reason of it and accordingly the position is the same as if they had no lien. Under these circumstances, on the facts which I have stated up to the present, it would seem quite obvious that the applicant is entitled to the relief for which he is now asking. He has employed a solicitor in an action, and the solicitor has acted for him in that matter. There are papers in the custody of the solicitor relating to the action of which the client is entitled to have copies. So far the matter seems simple beyond words. But now I come to the circumstances which, it is suggested, raise a difficulty in the way of my making the order for which the applicant asks. It is not, I think, disputed now, though a contrary suggestion in view of certain provisions in the Solicitors Act, was made at one time, that there is full jurisdiction in the court under its inherent jurisdiction, to make such an order as is asked for, and I shall assume for the purpose of my judgment that I have such jurisdiction. It is, however, said that the court ought not to make such an order in the circumstances of this case to which I now turn. The applicant, Mr. Groom, was insured under a policy against third party risks which was issued by an insurance company and which is in a very familiar form. Amongst other things the policy contains this condition [His Lordship read condition 2 set out above]. It was in accordance with that condition that the selection of the solicitors to act for the applicant in the action was made. The selection was admittedly made by the insurance company and they employed the solicitors, who, I assume, though I do not think that it is material, are frequently employed for such matters by the insurance company. However that may be, it was in virtue of that provision, and of the authority which the assured gave the insurance company to select the solicitor and conduct the proceedings that the action was carried on. But what I wish to emphasise is this, that throughout the hearing of this summons it was not in dispute, and cannot be in dispute, that the

solicitors, though selected by the insurance company, were, in all matters concerning the action, the solicitors of the applicant, who was a party to the action, the insurance company not being, of course, parties to the action. And thus, in respect of the duty which the solicitors owed to the applicant as his solicitors, the applicant under the ordinary rule would be entitled to have access to all the documents which were concerned with the matter in which the solicitors were acting as such for him. It is, however, suggested that this provision that the insurance company is to have absolute conduct and control of all or any proceedings against the insured, on its true construction, entitles the insurance company to direct the solicitors not to give effect to what is, *prima facie*, the applicant's rights, namely, that he should see his documents. It does not seem to me that there is anything in the words used in this condition in the policy which can have any such result. I agree that the words in the policy are that the insurance company are to have the conduct and control of all proceedings against the insured, but that these words should be interpreted as meaning that the insurance company is authorised by the insured to interfere with the ordinary rights which a client has against his solicitor seems to me, I must confess, unreasonable.

The next point which is suggested is that the court ought not in its discretion to make this order because the insurance company objects to the solicitors showing these documents to their client. I must confess that, if the applicant in this case had pressed, as he does not press, for the order asked for in the first part of the summons, namely, that the respondents should deliver up to him, or as he might direct, all deeds, documents, papers and writing in their custody, possession or power belonging to the applicant, there might have been a difficulty about the matter and a court might hesitate to make such an order as that in proceedings in which the company are not parties, and in which they have not had an opportunity themselves of presenting whatever contentions they might conceive to be possible. But an order in the terms of the first part of the summons is not what is requested. All that is asked for is that the client should see the documents that have come into being in regard to the matter in which he employed the solicitors, and I cannot see that the insurance company has any right to interfere with that. I appreciate that, having regard to the obligations which the insurance company has undertaken to the present applicant it may have an interest in the matter, and it may be that, if any question arises with regard to the policy as between the insurance company and the applicant, the company may desire to have access to these documents which the applicant desires to see. That may be a very good reason for maintaining the present custody of these documents in the hands of the solicitors. But why that should prevent the applicant seeing the documents I cannot understand, and I do not see what right I have to

interfere in what seems to me to be the plain right of a client against his solicitor. In these circumstances I propose to order that the respondents do at all reasonable times on reasonable notice produce at 42, Gracechurch Street, in the City of London, all books, documents, papers or writings in their custody, possession or power, relating to the action entitled *Groom v. Tear Brothers*, and that the applicant, his solicitors and agents be at liberty to inspect and peruse the documents so produced and to make notes of their contents, and be entitled to be supplied with copies thereof on payment therefor at the rate prescribed by R.S.C., Ord. 65, r. 27 (18), such production to be, if so required by the applicant, upon oath. The effect of that is this, that the solicitors will, of course, in the first instance take the responsibility of the books, documents, papers and writings which they have in their custody relating to the action. It may be that there are some documents in their custody which they think do not relate to the action but which in the applicant's opinion do. If there is any doubt whether any particular documents do or do not relate to the action the applicant must ask for an affidavit by the respondents as to those documents.

Solicitors : *Metcalf, Copeman & Pettefar* (for the applicant) ; *Linklaters & Paines* (for the respondents).

[Reported by C. M. YOUNG, Barrister-at-Law.]

GERARD v. WORTH OF PARIS, LTD.

[COURT OF APPEAL (Slesser and Romer, L.JJ.), June 29, 1936.]

Companies—Members' voluntary winding up—Judgment against liquidator for wrongful dismissal of employee—Garnishee order on liquidator's bank account—Companies Act, 1929 (c. 23), ss. 172, 174, 246-255.

A company went into liquidation under a resolution for a member's voluntary winding up. The liquidator summarily discharged its manageress, who sued the company for wrongful dismissal and obtained judgment in default of defence. She applied for a garnishee order on a bank account in the name of the liquidator. There was no evidence of any other claims on the company. The master refused to make the order absolute, but the judge in chambers reversed his decision. The liquidator appealed :—

HELD : (i) this being a members' voluntary winding up, it must be taken that the company was solvent, as there was no evidence to the contrary. There was therefore no question of all creditors being paid in full and the court might properly refuse to exercise its discretion to stay an execution, and make the garnishee order absolute.

(ii) the fact that the account was in the name of the liquidator was immaterial.

(iii) the liquidation did not in the circumstances dissolve the employee's existing contract with the company.

[EDITORIAL NOTE.] The position under a members' voluntary winding up is quite different from that under a creditors' winding up. In the former, which is the position in the present case, there is a declaration of solvency and, until the contrary is shown, the presumption is that all debts will be paid in full. There is therefore no case for any restriction to be placed upon a creditor issuing execution upon a judgment. This argument applies equally to a garnishee order, and, where the creditor has proceeded in this way, an order absolute can be made. The making of such an order is in the discretion of the court.

AS TO EXECUTION AGAINST A COMPANY IN VOLUNTARY LIQUIDATION, see HALSBURY, Hailsham Edn., Vol. 5, p. 778, para. 1337; and FOR CASES, see DIGEST, vol. 10, pp. 1013, 1014, Nos. 7031-7039.]

Cases referred to :

- (1) *Re Bank of Hindustan, China & Japan, Ex p. Levick* (1867), L.R. 5 Eq. 69; 10 Digest 1052, 7361.
- (2) *Anglo-Baltic & Mediterranean Bank v. Barber & Co.*, [1924] 2 K.B. 410; Digest Supp.
- (3) *Westbury v. Twigg & Co.*, [1892] 1 Q.B. 77; 10 Digest 1013, 7035.
- (4) *Re International Marine Hydropathic Co.* (1884), 28 Ch. D. 470; 10 Digest 970, 6669.
- (5) *Re Oak Pits Colliery Co.* (1882), 21 Ch. D. 322; 10 Digest 969, 6663.
- (6) *Reigate v. Union Manufacturing Co., (Ramsbottom)*, [1918] 1 K.B. 592; 9 Digest 536, 3532.

APPEAL by the liquidator of the defendant company from an order of HILBERY, J., made in chambers on June 12.

On Feb. 11, the shareholders of the defendant company passed a resolution for a members' voluntary winding up, and a liquidator was appointed. On Feb. 21 the liquidator dismissed the plaintiff, a

manageress, from the employment of the company. On Mar. 4 she sued the company for breach of contract and wrongful dismissal, and on May 1 obtained a judgment in default of defence, against the company for £671 and costs. On May 17 the master made a garnishee order *nisi* on the Midland Bank, Ltd., debtors of the company. On May 22 the master refused to make the order absolute, because the account was in the name of the liquidator. The plaintiff appealed to HILBERY, J., in chambers, who discharged the master's order and made the garnishee order absolute. Counsel were not agreed on his Lordship's reasons. On the one side it was said that the learned judge had taken the view that there was a new employment by the liquidator and that the damages were a liability incurred by him in carrying on the business for the purposes of liquidation; on the other, that his Lordship held that, as the liability arose after the liquidation and the liquidator had taken the benefit of the existing contract, he was in the same position with regard to the damages as he was to any other liability arising after the liquidation.

The liquidator appealed.

C. N. Tindale Davis for the liquidator.

G. Avgherinos for the judgment creditor.

Kenelm Preedy for the garnishees.

Tindale Davis: The effect of the Companies Act, 1929, ss. 246-255, is to stay all proceedings, including garnishee proceedings, brought against the company after the voluntary winding up. Sect. 174 applies to a voluntary liquidation. There is no distinction, for the purpose of staying proceedings in respect of the garnishee order, between a voluntary and compulsory winding up. Here there are no such exceptional circumstances as would justify the court in departing from the usual rule that a stay is always granted when a creditor obtains judgment against a company in voluntary liquidation. *Anglo-Baltic & Mediterranean Bank v. Barber & Co.* (2).

Avgherinos: The *Anglo-Baltic* case (2) has no application to the present case. The resolution to wind up did not put an end to the judgment creditor's employment; she was dismissed afterwards by the liquidator, and the dismissal had nothing to do with the liquidation. There must be a substantive application for a stay in a case of voluntary winding up: *Westbury v. Twigg & Co.* (3). If there had been a statutory stay under sect. 174, the judgment creditor would not have applied for a garnishee order. With deference to the learned editors of BUCKLEY ON THE LAW OF COMPANIES (note, p. 398), sect. 174 does not apply in a voluntary winding up. The court has discretion to stay proceedings, but also to take exceptional circumstances into account, and these are exceptional circumstances.

A liability which arises after liquidation must be paid in full and is not provable: *Re International Marine Co.* (4). The judgment creditor

only became a creditor after the resolution to wind up. The contract of employment was not terminated by the liquidation; the liquidator accepted the benefit of it on behalf of the creditors, and cannot profit by his wrongful dismissal of the respondent. In *Ex p. Levick* (1) it was held that, where an action brought by liquidators appointed in a voluntary winding up under supervision fails, execution by the defendant for costs will not be restrained.

SLESSER, L.J., referred to *Re Oak Pits Colliery Co.* (5).

Avgherinos: I have a priority. The liquidator's proper course was to disclaim under sect. 267 (7).

Tindale Davis, in reply: It makes no difference whether the company is solvent or not. By the rule of this court there must be a stay. Counsel referred to *Reigate v. Union Manufacturing Co.* (6), and BUCKLEY ON THE LAW OF COMPANIES, p. 514. The damages were for breach of an agreement made long before the liquidation and arose contingently out of an existing contract, and are therefore a liability under sect. 261. There is no special circumstance here to justify departure from the rule. None of the cases cited supports the proposition that this was an expense incurred by the liquidator in the course of the winding up.

SLESSER, L.J.: This appeal fails. It is an appeal from a judgment of HILBERY, J., ordering a garnishee order to be made absolute in respect of the account in the name of Léon Pierre Constantine, liquidator of Worth of Paris, Ltd., at the suit of one Madeleine Gérard, who was a judgment creditor. The circumstances of the case may very briefly, be stated thus. Mme. Gérard was an employee under an agreement, receiving a salary of £1,500 a year and a commission of $2\frac{1}{2}$ per cent on the turn-over of the defendants' business. The defendants are some very famous dressmakers known as Worth of Paris, of which the English company was called Worth of Paris, Ltd. Under that contract she would in the ordinary way have been entitled to continue her service until July 3, 1936; that is, if the defendants duly gave her the six months' notice in writing contemplated by the agreement. Of course, if they had not given the notice she would have continued in their service. It appears, however, that, first of all the events which we have here to consider, on Feb. 11, 1936, the defendants passed a resolution for a voluntary winding up, and one Léon Constantine was appointed liquidator. That resolution was for what is called a "members' winding up," and it appears, by reason of the provisions of the Companies Act, 1929, s. 230, that, in the case of a members' voluntary winding up as distinct from a creditors' voluntary winding up, where it is proposed to wind up a company voluntarily, the majority of the directors of the company have to carry and pass a declaration to the effect that the company is solvent. The actual language is:

make a statutory declaration to the effect that they have made a full inquiry

into the affairs of the company, and that, having so done, they have formed the opinion that the company will be able to pay its debts in full within a period, not exceeding twelve months, from the commencement of the winding up.

We have been told that there is no reason to suppose that this company is not solvent, and no mention has been made in the argument before us of any creditors of this company other than the plaintiff Madeleine Gérard. I shall therefore assume for the purposes of this case that this company is solvent and is able to pay its creditors in full. There is no suggestion, at any rate before us, nor was there before the learned judge or the master, to the contrary.

That resolution having been carried on Feb. 11, 1936, and M. Léon Constantine having been appointed liquidator, this lady continued in the service of the company; and on Feb. 21, 1936, M. Constantine writes to her:

Madam,

Following the scandal you have just provoked in our showrooms, I have the honour to inform you, in my capacity of liquidator of Worth of Paris, Ltd., that I wish you to leave your employment immediately. . . . I therefore consider that these facts permit me to dispense with your services as from to-day's date. I also consider that your attitude constitutes a breach of contract on your part towards the company regarding which I reserve my rights for the future.

The lady evidently immediately communicated with her solicitors, who wrote a letter the same day to M. Constantine, the liquidator of Messrs. Worth of Paris, Ltd.:

Dear Sir,

I am instructed by Mme. Gérard with reference to the circumstances of her termination of her employment with Worth of Paris, Ltd., and the salary owing to her. I am instructed that as receiver of the company you requested Mme. Gérard to leave her employment as from to-day's date. You are probably aware that under the terms of the notice given by Mme. Gérard to the company she is entitled either to remain in the employ of the company until July 3 next or to receive her salary to that date. Under the terms of her agreement with the company, as amended by a letter given to her by the directors of the company, Mme. Gérard is entitled to be remunerated at the rate of £1,750 per annum from Feb. 14 to July 3 next. The amount, therefore, due to my client in respect of salary for this period is £671 4s. 6d.

And they ask for a cheque. In reply, M. Constantine says:

Dear Sirs,

Your letter of the 21st inst. to hand. In reply, I wish to state that the scandalous conduct of Mme. Gérard in the company's showrooms yesterday constitutes, in my opinion, a breach of contract which justifies my termination of our agreement the same day without further notice and without any indemnity.

I think it is clear from the correspondence that the liquidator treated the agreement with Mme. Gérard as a continuing agreement with the company, he acting as the agent of the company for the purpose of

giving her dismissal. It was not an agreement directly with him as such, as liquidator, but she continued in the service of the company.

She then issued her writ and brought her action, and claimed £671 4s. 6d., being £33 13s. 10d. remuneration due and unpaid from Feb. 14 to Feb. 21, 1936, and the balance damages for wrongful dismissal. On that she obtained judgment by default, and she therefore became a judgment creditor for that amount. She might, perhaps, have proceeded in some other way, but she elected to proceed by these garnishee proceedings to garnish the moneys in the account of Léon Pierre Constantine, the liquidator; and accordingly she applied to the master to have the garnishee order made absolute. The master appears to have taken the view that, in so far as the debt was owing to the company and the account was in the name of the liquidator, there was a difficulty in proceeding by garnishee order.

In my view the learned master, if that was his view, was mistaken. If all other requirements were satisfied and the lady was entitled to garnishee that account of the company, the mere fact that it stood in the name of the liquidator does not seem to me to effect any difference in her rights. However, whatever the view that the learned master took, there was an appeal to the learned judge, who made the order absolute. This is a case where it is clear that sect. 174 of the Companies Act, as such, has no direct application. That section, which says:

Where any company registered in England is being wound up by the court, any . . . execution put in force against the estate or effects of the company . . . shall be void.

does not apply in this case in those terms, because this company was not being wound up by the court. On the other hand, no application has been made by the company for a stay in the proceedings under sect. 172. But, as I understand the decision in *Levick's* case (1), we may properly deal with this case as if such an application had been made; and, had such an application been made, then it would be in the discretion of the court to grant or not to grant a stay of the proceedings.

I have come to the conclusion that this is one of the cases contemplated in *Anglo-Baltic & Mediterranean Bank v. Barber & Co.* (2) where the court in its discretion may properly refuse to grant a stay. I think so for the following reason. It appears from the judgments in that case, which are only stating what I understand to have been laid down in the earlier authorities, that, as SCRUTTON, L.J., says, at pp. 417-8:

It is now the almost invariable practice when a company is in voluntary liquidation to stay proceedings in an action against it, because the result of allowing a judgment creditor to proceed to execution might be that, instead of the assets being divided among the creditors *pari passu*, the judgment creditor, by enforcing his judgment, would obtain an advantage over the other creditors. . . . But it is only in very special circumstances such as those that the court will depart from its

general practice of staying execution when the company is in voluntary liquidation, for the reason that the execution, if allowed, would necessarily interfere with the distribution of the assets *pari passu*.

And ATKIN, L.J., at p. 420, says :

The only ground on which leave to issue execution in this case could be justified would be on the supposition that the judgment creditor had some right in equity over the debt which he seeks to take in execution under the garnishee proceedings.

In my view this case is not one of those which might produce that mischief which SCRUTTON, L.J., intimates might arise were the stay not to be granted ; because this is not a case, this company being solvent—and there is no suggestion of other creditors claiming these moneys—where the execution if allowed (to quote SCRUTTON, L.J.) “ would necessarily interfere with the distribution of the assets *pari passu*.” It does not seem to be a case where there is any danger that, instead of the assets being divided among the creditors, the judgment creditor may obtain an advantage over the other creditors. What advantage, I ask myself, would this judgment creditor obtain over the other creditors in the present case ? So far as we know, there are no other creditors, and that fact alone seems to me a sufficient reason, this lady having a judgment debt, being entitled in the ordinary course of events to enforce it by these garnishee proceedings, the argument which can frequently be used in a winding up where there is reason to suppose that the other creditors will not have their rights, does not apply in the absence of any evidence that any other claims at all have been made against this company. In my view, and for these reasons, this is a case where the court should exercise its discretion in favour of the plaintiff, and not disturb that discretion which the learned judge has already exercised in that direction.

ROMER, L.J. : I agree.

Appeal dismissed with costs.

Solicitors : *Thompson, Quarrell & Co.* (for the appellants) ; *T. Magnus Wechsler* (for the respondent) ; *John Carnegie & Mosely* (for the garnishee).

[Reported by DEREK H. KITCHIN, ESQ., Barrister-at-Law.]

DUNCAN v. ABERDEEN COUNTY COUNCIL.

[HOUSE OF LORDS (Lord Blanesburgh, Lord Atkin, Lord Thankerton, Lord Macmillan and Lord Maugham), **May 22, 25, July 2, 1936.**]

Poor Law—Relief—Disability pension—Whether first one pound of pension should be disregarded in considering application for relief—Poor Law (Scotland) Act, 1934 (c. 52), s. 11 (1) (d).

By the Poor Law (Scotland) Act, 1934, s. 11 (1) (which is similar to the Poor Law Act, 1934, s. 1 (b) (4)) it is provided that "In affording outdoor relief to any person a local authority shall disregard . . . (d) the first one pound of any wounds or disability pension of which he, or any other person whose resources the authority take into account in relieving him, is in receipt."

An ex-service man, whose sole income for the maintenance of himself, his wife and five children was a 100 per cent. disability pension of £2 per week, applied for poor relief from the local authority because he was unable adequately to maintain himself and his family. The local authority decided that the applicant was not entitled to relief on the ground that his income of £2 per week was sufficient for maintenance, and contended that, as the above section of the Act applied only for the purposes of regulating the amount of relief to be afforded to persons who have first of all been found entitled to relief, they were not bound to disregard the first one pound of the applicant's pension when determining whether the applicant was entitled to relief:—

HELD: the respondents were bound by the above section to disregard the first pound of the appellant's disability pension when considering whether or not he was entitled to relief as well as when calculating the amount of relief payable.

[EDITORIAL NOTE.] It is agreed that the Scottish Act here construed is in similar terms to the English Act and this decision therefore applies equally in the construction of the English Act.

FOR THE LAW ON THE POINT, see HALSBURY, Supp. to Vol. 22, para. 1191, and FOR THE POOR LAW ACT, 1934, s. 1 (b) (4), see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 27, p. 457].

Cases referred to:

(1) *Jack v. Isdale* (1866), L.R. 1 Sc. & Div. 1, 4 M. (Sc.) (H. L.) 1; 37 Digest 226, 182 (ix).

(2) *Forsyth v. Nicholl* (1877), 5 M. (Sc.) 293.

APPEAL from a judgment of the First Division of the Court of Session (the LORD PRESIDENT (LORD NORMAND), LORD MORISON; LORD MONCRIEFF dissenting) reversing a judgment of the Sheriff-Substitute in favour of the appellant. The arguments are fully referred to in the judgments.

James Stevenson, K.C., and *James C. M. Guy* for the appellant.

W. D. Patrick, K.C., and *H. A. Shewan* for the respondents.

LORD BLANESBURGH [read by LORD ATKIN]: My Lords,⁷ the LORD PRESIDENT in his judgment in this case described the question raised as at once difficult and important. And so it is.

The appellant, residing at Hatton, is a cabinet maker by trade, disabled and unable to follow his occupation as a result of wounds received in the Great War. The respondents, the county council of the county of Aberdeen, are the local authority for public assistance, responsible for the relief of the poor within the county. The appellant, now 44 years of age, served as a soldier during the war. As a result of his wounds his right leg has had to be amputated at the hip: and his right elbow joint is locked. He has a wife and five children—the eldest, a boy of fifteen holds a bursary of £5 at the Ellon Higher Grade School: the youngest is a girl of seven. All the children are at school. The appellant's only income is a 100 per cent. wounds and disability pension of £2 a week granted to him in 1921. As he married after the pension had been awarded he receives no allowance from the Ministry of Pensions in respect of his wife and children.

In March, 1935, a few days after the Poor Law (Scotland) Act, 1934, s. 11, had been brought into effect by order pronounced on Mar. 1 by the Secretary of State the appellant, unable adequately to maintain a household of seven persons on his slender resources, applied to the public assistance committee of the respondent county council at Cruden for relief. But the committee, holding on the facts of the case as just stated that there was no need, refused the appellant's application. The committee, believing that they were bound so to do, regarded the appellant as being effectively in receipt of his full pension of £2 a week. The appellant, however, basing himself upon sect. 11 (1) (d) of the Act referred to, which was, of course, always the foundation of his application for relief, and contending that his was a case in which the local authority must disregard the first one pound of the pension of which he was in receipt, appealed to the sheriff for an order upon the respondents to afford him such outdoor relief as he might be legally entitled to for himself and his dependants. His case before the sheriff was that the respondents were by the new Act bound to disregard one pound of his pension as much when determining whether he was a poor person as in determining the amount of relief to be granted to him. The answer of the respondents was that the subsection in question only applies for the purpose of regulating the amount of outdoor relief to be given to one who, apart from the section altogether, would be a person entitled to relief. The respondents, however, whose sole purpose throughout these proceedings has been to obtain an authoritative ruling upon an administrative question of great importance, put it upon record

that if they were entitled and bound in terms of the said section to disregard the first one pound of the [appellant's] pension for the purposes of determining whether the [appellant] was entitled to relief under the Poor Law Acts they would have held the [appellant] entitled to relief.

This, then, is the question. Were the respondents so entitled and

bound? The sheriff-substitute upheld the appellant's contention. In his view in considering and determining whether the appellant's case was one in which relief under the Poor Law Acts should be afforded the respondents were bound to disregard the first one pound of his disability pension. On appeal to the Court of Session, the First Division, by a majority—the LORD PRESIDENT and LORD MORISON—LORD MONCRIEFF dissenting, disagreeing with the learned sheriff-substitute, upheld the contention of the respondents. Hence this appeal to your Lordships' House.

My Lords, if only for convenience of reference it may be helpful to set forth here, textually, sect. 11 of the Act of 1934, on which everything turns: along with another section of the Act—sect. 4—as one throwing a light upon the construction of sect. 11 in a respect here critical. That section, so far as material, is as follows, I italicize the all important words:—

11.—(1) *In affording outdoor relief to any person* a local authority shall disregard

(d) the first one pound of any wounds or disability pension of which he, or any other person whose resources the authority take into account in relieving him, is in receipt.

(2) where a person to whom a local authority have afforded outdoor relief shows to the satisfaction of the department that the authority, in affording such relief, have failed in any respect to comply with the provisions of the foregoing subsection, then, notwithstanding anything in sect. 75 of the principal Act, he shall be entitled to recover from the authority such sum as the department may certify to be the difference in amount between the relief afforded to him and the relief which he would have received had the authority duly complied with the provisions of the said subsection.

(3) The National Health Insurance Act, 1924, s. 105 (1), is hereby repealed, and the Transitional Payments (Determination of Need) Act, 1932, so far as it applies to the granting of outdoor relief under the enactments relating to the poor law, shall have effect as if rule (a) in sect. 1 (1) were omitted.

(4) This section, so far as it relates to wounds or disability pensions and to the Transitional Payments (Determination of Need) Act, 1932, shall come into operation on such date as the Secretary of State may appoint.

Sect. 4 is in the terms following, I again italicize the critical words:—

4.—(1) *Where any person who is dissatisfied with a decision refusing to afford him relief, or refusing to afford him relief otherwise than by admission to a poor house, makes application to the local authority within seven days after intimation to him of such decision, for a written statement of the grounds thereof, the local authority shall forthwith furnish him with such statement.*

(2) Whenever any such decision as aforesaid is intimated to an applicant for relief, the intimation shall be accompanied by a statement informing him of the provisions of the foregoing subsection and of his right to, and the manner in which he may, appeal against such decision.

My Lords, upon the question thus at issue, I find myself in entire agreement with the views about to be expressed by your Lordships

individually in judgments which I have been privileged to read. Accordingly, I will limit what I have to say almost to a sentence. This section, as I see it, is a remedial section intended specially to benefit a class of persons entitled, in the view of the legislature, to exceptional consideration. No construction of it is, I think, tenable—if another be open—which would make the receipt of that which in the event is by the section to be disregarded itself a bar to the reception of an application for relief. Such, however, is the position to which the appellant here is relegated by the decision appealed from. My Lords, as is made plain by the opinions of your Lordships there are more ways than one in which a construction of the section, which in this and many another case would strike its beneficial provisions with sterility, can be properly avoided. For myself, I believe that the words “in affording” cover the whole procedure in outdoor relief from the moment of application for it to the moment when it is disposed of and that the word “afford” may be so used in this Act is shown by reference to its use in sect. 4. The implication after the word “in” of such words as “proceedings for affording” would express a result which, in my view, is already conveyed by the words as they stand.

In my judgment this appeal should be allowed, and the interlocutor appealed from be reversed, and that of the sheriff-substitute restored. And I move your Lordships accordingly.

LORD ATKIN: My Lords, I agree with the opinions which have been and are about to be delivered and I only add some words of my own out of the respect which I feel for the opinions of the learned judges from whom we differ. This is a question of construction, and for my own part even if we had not in the statute itself, as I think we have, a satisfactory guide to the meaning of the words used I should have found no difficulty in accepting the construction put upon them by the appellant. “In affording outdoor relief to any person the authority shall disregard”—in the context in which they are used mean, as I think, “in administering outdoor relief”: and necessarily apply to the two operations, if they are two, of deciding to whom relief shall be given and how much shall be given. The trend of legislation is unmistakeable. Beginning with transitional payments in 1932 and passing to unemployment allowances in 1934 provisions have been enacted which make it plain that in calculating the payments to be made and in the latter case in determining whether a payment is to be made at all certain income of the proposed recipients is to be disregarded. They are obviously remedial provisions intended to make the position of the persons to whom they apply better than ordinary. In substance and certainly with regard to those which are repeated in the present section they refer to income which the recipient has paid for by contributions or war service. To the

extent provided in the relevant sections he is in no circumstances to lose the benefit of those earned receipts. The Act of 1932, by sect. 2, applied the same principles to the grant of outdoor relief, but only at the option of the poor law authority: and I for my part feel no doubt that the effect of sect. 2 was to enable the poor law authority to disregard the income mentioned both in deciding upon the need of relief and the amount to be given. Then follow the Poor Law (Scotland) Act, 1934, the Act under consideration and the Poor Law Act, 1934, the English Act passed after the Scottish Act and expressed to be "an Act to amend the enactments relating to the relief of the poor in England and Wales so as to secure uniformity throughout Great Britain in the provisions relating to the disregarding of sick pay, maternity benefit, and wounds or disability pensions" which in sect. 1 (b) (4) enacts that in granting outdoor relief the poor law authority shall disregard the first pound of a disability pension. If the English Act stood alone I doubt whether any person would have thought of the analysis into two operations, deciding (i) the person and (ii) the amount, or confined the remedial effect of the Act to the latter operation. Both operations seem to me necessarily involved when a person undertakes to "grant" a charitable allowance. And the same result seems to follow when one is construing the words in the Scottish Act "in affording outdoor relief." I think the words in the context are synonymous in both Acts and have the meaning I have stated. The other view is with respect much too refined for use in ordinary public administration: it would be quite unintelligible to the persons who are in receipt of the payments named and must be attended by the natural discontent of those who find that the supposed alleviation of their position is a mockery: and that they may be worse off than if they had earned and received only half their pension. I find no difficulty in what found weight with the LORD PRESIDENT, the question of indoor relief. We are dealing only with outdoor relief in which questions of means to support the poor person outside the poor law institution and the money necessary to supplement those means alone come into question. Poor law relief has fortunately swung away from the workhouse: its shadow no longer looms over the dwellings of the ageing poor: and except for those who are sick or aged and friendless, indoor relief is hardly a practical question. When outdoor relief is not expedient the legislature may well have thought it unnecessary to interfere.

These considerations would have led me to reject the construction that "affording outdoor relief" has the limited meaning put upon it by the respondents. But when the preceding sections of the Act in question are referred to the meaning is made plain. The Act itself is its own dictionary. Sect. 3 appears to prescribe the general duty which it defines as being "to afford relief": a context which to my mind

plainly precludes the construction that these words refer only to deciding upon the appropriate allowance. Sect. 4 refers to the right to information of a person who is "dissatisfied with a decision refusing to afford him relief," words plainly referring to a refusal based on a decision that he is not qualified for relief: and made clearer by the connection pointed out in argument by my noble and learned friend LORD THANKERTON with the right of appeal given by the Poor Law (Scotland) Act, 1845, s. 73, where the appeal is against "the refusal of relief." Though I come to the conclusion above stated solely on the construction of the Act, as this is a matter of general public administration I think it satisfactory to find that the opinion of the Scottish Department of Health as expressed in the minute of the respondents to be found in the appendix appears to be in accordance with the conclusion at which your Lordships have arrived. My Lords, I concur in the motion proposed.

LORD THANKERTON [read by LORD RUSSELL OF KILLOWEN]: My Lords, the right to poor relief in Scotland is purely statutory; it was first conferred by the Act, 1579, c. 12, which was superseded by the Poor Law (Scotland) Act of 1845, and was finally repealed by the Statute Law Revision (Scotland) Act, 1906. The Act of 1845 still remains the principal Act. The right of poor persons to permanent relief is a legal right, and the right of the poor law authority to give permanent relief is a correlative right. If there is no right to demand relief, there is none to give it: *Jack v. Isdale* (1) per LORD CRANWORTH, L.C., at p. 6. On the other hand, occasional relief is in the discretion of the authority. I shall confine my observations to permanent relief. It is for this reason that the person demanding relief is given a right to apply to the sheriff against a refusal by the authority to give relief. On the other hand, any question as to the adequacy of the relief offered by the authority is made subject to an appeal to the administrative authority, now the Department of Health for Scotland. This distinction is well illustrated by the case of *Forsyth v. Nicholl* (2), in which it was held that a refusal of outdoor relief with an offer of indoor relief was a legal tender of relief, and that therefore the appeal to the sheriff failed; LORD COWAN, at p. 297, said:

Whether the offer to receive the applicant into the poorhouse was a legal tender of relief is one question, and whether the relief offered was adequate and suitable is another and different question. The first is for this court to decide, but as regards the second, the remedy is an application to the board of supervision.

In recent years some striking changes have been made in the poor law. Public opinion had long been modifying the conception of a social stigma in the receipt of poor relief. Post-war conditions had forced attention to the exclusion of able-bodied persons in Scotland from poor

relief, a distinction from the law of England dating back to the Act of 1579. The development of insurance schemes against health and old age, some of which involved expenditure from public funds, rendered it advisable to deal with their relation to poor relief, and the aftermath of the war in the shape of wounds and disability pensions also required consideration. The disqualification of paupers for the exercise of the franchise was removed by the Representation of the People Act, 1918. A temporary Act, the Poor Law Emergency Provisions (Scotland) Act, was passed in 1921, under which poor relief was extended to destitute able-bodied persons out of employment; this provision was re-enacted, with some amendments, as a temporary measure, until it was permanently incorporated in the poor law by the Poor Law (Scotland) Act, 1934. These enactments made no distinction between indoor and outdoor relief, but the further provisions of the Act of 1934, which have been already referred to by the noble Lord on the Woolsack, do raise a difficulty in so far as they relate to outdoor relief only. Similarly, the provisions of the National Health Insurance Act, 1924, s. 105 (1) and the Transitional Payments (Determination of Need) Act, 1932, s. 1 (2), relate only to outdoor relief. It may be noted that in sect. 12 of the first National Health Insurance Act in 1911, and in the National Health Insurance Act, 1924, s. 17, special provision was made for administration of the sickness and maternity benefits while the insured person was receiving certain forms of indoor relief.

The present question turns on the construction of the words "In affording outdoor relief to any person" in the Poor Law (Scotland) Act, 1934, s. 11 (1). The appellant maintains that the section affects not only the assessment of outdoor relief, but also the standard of poverty which entitles an applicant to relief. The respondents maintain that the section only applies to the assessment of relief, and in this they have been supported by the majority of the judges of the First Division. In the first place, one may gain some assistance from the sense in which the word "afford" is used in sect. 11 (1) by looking at other sections in the same Act, and I find that sect. 4 is very helpful, for in it the phrase "refusing to afford him relief" can only apply to the initial stage of right to relief; this is made even clearer by noting that the decision refusing to afford relief is manifestly the same event as is described in sect. 73 of the Act of 1845 by the words "If relief shall be refused." Sect. 18 (2) of the 1934 Act provides that it shall be read and construed as one with the Act of 1845. My Lords, if sect. 11 (1) had not been confined to outdoor relief, in my opinion there could have been no doubt that sect. 11 (1) applied both to the standard which gives the legal right to relief and to the assessment of the relief to be given. Does the qualification of "affording relief" by the word "outdoor" in that section give a more limited meaning to these two words? It is essential

to realise that the decision of the authority to refuse or to give relief is not a judicial or a discretionary determination by them, but is a denial or admission of a legal liability. The application to the sheriff under sect. 73 is not truly an appeal, but calls on the sheriff to determine, as between the disputants, the question of legal liability.

In the second place, once the legal liability of the authority is either admitted by them or determined by the sheriff, the authority is under a statutory liability to give adequate relief. This is an absolute duty, the due discharge of which is controlled by the department.

My Lords, I am clearly of opinion that the standard of poverty which gives the legal right to relief and the standard of adequate relief from that poverty ought to be correlative, and that any construction of sect. 11 (1) which leads to a difference in these standards is to be avoided, if possible. Although it is true that the wider construction of this section will lead to different standards of poverty in the cases of indoor and outdoor relief, Parliament has clearly drawn distinctions between the two cases, and the only question is how far those distinctions extend. In my opinion, sect. 11 (1) of the Act of 1934 alters not only the standard of adequacy of outdoor relief, but also the standard of poverty which is to give the legal right to that form of relief. If this be correct, the conclusion is inevitable that the local authority is bound to disregard the first pound of the disability pension to which the appellant is entitled, when considering whether he has a right to relief. Accordingly, I concur in the motion proposed by my noble and learned friend on the Woolsack.

LORD RUSSELL OF KILLOWEN : My Lords, I am also authorised by my noble and learned friend, LORD MAUGHAM, that he has had the opportunity of considering the opinion of my noble and learned friend, LORD THANKERTON, which I have just read, and that he entirely agrees with it, and has nothing to add.

LORD MACMILLAN : My Lords, the public assistance committee of the respondent county council have refused the appellant's application for poor relief on the ground that in his case "there is no need." This decision, as their minutes further inform your Lordships, they reached having regard to the fact that the appellant "is in receipt of a disability pension of £2 per week which has hitherto met his needs." Being dissatisfied with this decision "refusing to afford him relief," the appellant was entitled under the Poor Law (Scotland) Act, 1934, s. 4 (1) to obtain from the respondents a written statement of the grounds thereof, in order to enable him, if so advised, to appeal to the sheriff under the Poor Law (Scotland) Act, 1845, s. 73. The grounds of refusal, stated at the appellant's request, bear that he was refused relief because he was :

in possession of an income of two pounds sterling per week which is deemed to be

sufficient for the needs of your household and accordingly the council of the county of Aberdeen are under no legal liability to afford relief.

My Lords, it is provided in the Poor Law (Scotland) Act, 1934, s. 11 (1) that :

in affording outdoor relief to any person a local authority shall disregard . . . (d) the first one pound of any wounds or disability pension of which he . . . is in receipt.

The respondents

admit that if they were entitled and bound in terms of the said section to disregard the first one pound of the [appellant's] pension for the purposes of determining whether the [appellant] was entitled to relief, they would have held the [appellant] entitled to relief.

The sole question for decision accordingly is one of construction, and the case turns upon the meaning to be assigned to the word "afford" employed in sect. 11 (1) of the Act above quoted. The respondents say that the statutory direction has no relation to the determination of the primary question whether the circumstances of an applicant are such as to entitle him to relief, but apply only after this question has been determined in the applicant's favour when the question of the amount of relief to be given to him has to be decided. My Lords, the survey of the statutory history of the Scottish poor law which the learned LORD PRESIDENT has furnished no doubt shows that these two questions are for certain purposes distinct and that the process of decision in the ordinary case involves two stages. But I do not think that the existence of this distinction leads to the result that the expression "affording relief" must be construed as applicable only to the second stage. The word "afford" has no technical meaning in this context, and I agree with the LORD PRESIDENT that it must be "construed as it is used in ordinary language." So reading it, I confess that I should have thought that it applied comprehensively to the whole process of determining whether, and if so, what relief should be given to an applicant. This impression is confirmed by a consideration of the purpose and tenor of the statute of 1934 as a whole, and indeed to my mind is put beyond doubt by the language of sect. 4 (1). That subsection, to which I have already referred, provides that "where any person who is dissatisfied with a decision refusing to afford him relief" makes application to the local authority for a written statement of the grounds of the refusal he shall be furnished with such statement by the local authority. Here the word "afford" is plainly used in relation to the determination of what has been described as the first question, namely, the question of the applicant's right to relief. The respondents, in obedience to this subsection, furnished the appellant with a written statement of the grounds of their decision "refusing to afford him relief" yet they now say that they never reached the question of "affording" him relief.

My Lords, I do not think that there is any justification for holding that the verb "afford" is used in one sense in sect. 4 (1) and in another sense in sect. 11 (1), or for importing any technical implications into its interpretation in the latter instance. I certainly do not find any such justification in the fact that sect. 11 (1) relates only to the affording of outdoor relief. For this there may quite well have been adequate administrative reasons. I accordingly concur in the motion that the interlocutor of the First Division should be reversed and the judgment of the sheriff-substitute restored.

Appeal allowed and judgment of sheriff-substitute restored.

Solicitors: *Nicholson, Freeland & Shepherd*, for *Strathern & Blair*, W.S., Edinburgh (for the appellant); *R. C. Bartlett & Co.*, for *Bryson, Sons & Davie*, S.S.C., Edinburgh (for the respondents).

[Reported by MICHAEL MARCUS, ESQ., Barrister-at-Law.]

MULLARD RADIO VALVE COMPANY, LTD. v. PHILCO RADIO AND TELEVISION CORPORATION OF GREAT BRITAIN, LTD., AND OTHERS.

[HOUSE OF LORDS (Lord Blanesburgh, Lord Macmillan, Lord Alness and Lord Roche), **March 9-30, June 30, 1936.**]

Patent—Validity—Novelty—Patentable subject-matter—Prior publication—Prior grant—Patents and Designs Act, 1907 (c. 29), s. 25 (2).

Letters patent were granted for "Improvements in or relating to circuit arrangements and discharge tubes for amplifying electric oscillations." Claim 1 of the patent was for "a circuit arrangement for amplifying electric oscillations by means of one or more thermionic discharge tubes connected in series or cascade, etc." Claim 2 was for "a discharge tube having at least three auxiliary electrodes between the cathode and the anode, characterised in that the auxiliary electrode nearest to the anode is directly connected to the cathode so as to be maintained continuously at the cathode potential." Claim 5 was for "the discharge tube substantially as described." The present appellants, in an action for infringement of the patent, alleged infringement of claims 2 and 5 in respect of the sale of certain wireless valves. No infringement of claim 1 was alleged. The present respondents at first denied, but subsequently did not dispute infringement, and claimed that the letters patent were invalid for want of novelty or patentable subject matter, and by reason of prior grant and prior publication:—

HELD: (i) claim 1 was valid as an invention possessing novelty, utility and subject matter.

(ii) claim 2 was invalid, as the monopoly claimed was wider than the subject matter of the invention; and claim 5 was consequently also invalid as it related to subject matter within claim 2 and was also ambiguous.

[EDITORIAL NOTE.] It is a matter of some importance to limit the monopoly of a patentee within proper limits and this case deals with the proper limitation

to be made in such a case. Though an invention be new, useful and have subject matter, yet a claim may be too wide as extending beyond the subject matter of the invention. An article of obvious construction may be discovered to give a valuable and new benefit if employed in a particular way, but this does not entitle the discoverer to claim protection for the article itself and prevent others from making that article. The invention is the particular way in which the article is employed and that is the only subject matter which is patentable, and therefore the only claim which can be made.

AS TO CLAIMS, see HALSBURY, 1st Edn., Vol. 22, Patents, pp. 161-163, paras. 338-341, and for CASES, see DIGEST, Vol. 36, pp. 630-633, Nos. 982-1033.]

Cases referred to :

- (1) *Hill v. Thompson* (1817), 1 Web. Pat. Cas. 237 ; 36 Digest 605, 666.
- (2) *Ingersoll Sergeant Drill Co. v. Consolidated Pneumatic Tool Co., Ltd.* (1907), 25 R.P.C. 61 ; 36 Digest 634, 1040.
- (3) *Gandy v. Reddaway* (1883), 2 R.P.C. 49 ; 36 Digest 615, 803.
- (4) *Dick v. Ellam's Duplicator Co.* (1900), 17 R.P.C. 196 ; 36 Digest 617, 830.
- (5) *Woodrow v. Long, Humphreys & Co., Ltd.* (1933), 51 R.P.C. 25 ; Digest Supp.
- (6) *Adhesive Dry Mounting Co., Ltd. v. Trapp & Co.* (1910), 27 R.P.C. 341 ; 36 Digest 601, 633.
- (7) *Fawcett v. Homan* (1896), 13 R.P.C. 398 ; 36 Digest 564, 285.
- (8) *National Colour Kinematograph Co., Ltd. v. Bioschemes, Ltd.* (1915), 32 R.P.C. 256.

APPEAL from an order of the Court of Appeal affirming the judgment of FARWELL, J., in favour of the present respondents. The facts and the arguments are fully set out in the judgments.

R. Moritz, K.C., Sir Stafford Cripps, K.C., and L. F. Heald for the appellants.

James Whitehead, K.C., W. Trevor Watson, K.C., and G. W. Tookey for the respondents.

LORD BLANESBURGH : My Lords, I have had the privilege of reading in advance the judgment which my noble and learned friend LORD MACMILLAN will presently deliver, and I desire to associate myself with him in the conclusion at which he has arrived and in the line of reasoning which in common with MAUGHAM, L.J., in the Court of Appeal, my noble and learned friend has followed. My Lords, it would be a work of supererogation on my part to attempt to traverse again the difficult territory which my two noble and learned friends have so fully explored in their judgments, and I refrain. I would venture to make one observation only. I have myself great sympathy with LORD HANWORTH'S view that while claim 2 of the specification is too wide, claim 1 is bad also, in that it is devoid of inventive merit. Like LORD HANWORTH, I would, I think, save for the evidence of Professor Appleton, have been prepared to hold that in the face of Schonland's communication to the Royal Society, claim 1 required of the patentee no inventive skill and called for nothing from him but trial and experiment to ascertain whether the phenomena found by Schonland to be operative at high

frequencies were also manifest, as in fact they are, at the lower frequencies here involved. But Professor Appleton's statement that this result disclosed by the patentee surprised him—a statement neither seriously cross-examined to nor countered by any expert evidence on the respondents' side—is evidence which, in a region so mysterious I cannot judicially question. Accordingly on this part of the case also I agree with all your Lordships, although it would more accurately express my state of mind if I were to say that I feel constrained so to do. My Lords, on the question of pleading referred to by LORD ROCHE in his judgment, I desire definitely to express my concurrence in the views there enunciated by my noble and learned friend. Therefore, my Lords, I concur in the motion which my noble and learned friend LORD MACMILLAN will make to the House.

LORD MACMILLAN : My Lords, the appellants are in right of letters patent No. 287,958**, dated Dec. 24, 1926, for "Improvements in or relating to circuit arrangements and discharge tubes for amplifying electric oscillations." The asterisks denote that the specification has been twice amended, first in 1930 and again in 1932. On Nov. 25, 1933, the present proceedings were begun by the issuing of a writ at the instance of the appellants in the Chancery Division of the High Court of Justice by which it was sought to restrain the respondents from infringing the appellants' letters patent. Two only of the claims in the specification were alleged to have been infringed by the respondents, namely, those numbered 2 and 5. In their defences the respondents denied infringement and challenged the validity of the appellants' letters patent. Infringement was subsequently not disputed, and the sole contest both in the courts below and in your Lordships' House has been concerned with the question of the validity of the appellants' letters patent and in particular of claims 2 and 5 of the specification. The validity of claim 1, although this claim was not alleged to have been infringed, also came under discussion, as will appear in the sequel. In their particulars of objections the respondents attacked the appellants' alleged invention on the grounds (i) that it was not novel by reason of (a) prior publication and (b) prior common general knowledge; (ii) that it was not proper subject matter for letters patent; (iii) that it was the subject matter of a prior grant; (iv) that the claims of the amended complete specification were ambiguous and did not sufficiently define the monopoly sought to be claimed; and (v) that it was not useful.

FARWELL, J., who heard the case in the first instance, dismissed the action. He held that "it did not require any inventive step to construct a valve similar to that described in claim 2" and consequently that that claim was invalid. Claim 5 fell with claim 2. Incidentally the learned judge held that claim 1 was valid and certified under the Patents

and Designs Act, 1907, s. 35, that it had come in question. In the course of his judgment he recorded that "one of the grounds pleaded, that is, want of utility, was abandoned at the bar." In the Court of Appeal, LORD HANWORTH, M.R., held, and he alone held, that "the defence of want of novelty" had been made out on the ground that what was "claimed as the inventive idea" had been disclosed in a paper by B. F. J. Schonland communicated to and published in the proceedings of the Royal Society in 1923. He further held that claim 2 was bad as being "wider than the invention which, it may be assumed, was in fact made." ROMER and MAUGHAM, L.JJ., while of opinion that the invention was not obvious or lacking in novelty, nevertheless pronounced claim 2 to be invalid in respect that it was too wide, claimed a monopoly more extensive than the invention, and included forms of discharge tubes which exhibited no patentable subject matter. The order of FARWELL, J., dismissing the action was accordingly affirmed by the Court of Appeal. From these unanimous adverse judgments below the appellants now appeal to your Lordships' House.

In their printed case the respondents appended two reasons and two reasons only why the judgments below should be affirmed :

1. Because claims 2 and 5, which are the only claims relied upon by the appellants, are both invalid for want of novelty or patentable subject matter. 2. Because claim 5 is ambiguous.

With equal brevity the appellants submit that the judgments below should be reversed because the letters patent and the claiming clauses thereof are valid ; because the respondents have infringed the second and fifth claims ; and because the judgments below in so far as they hold claims 2 and 5 to be invalid are erroneous in fact and in law. It was not disputed that if claim 2 should be held by your Lordships to be invalid, claim 5 must share the same fate. The main question therefore is whether the respondents are justified in their contention that claim 2 is invalid for want of novelty or patentable subject matter. The Act of 1907 in sect. 25 (2) enumerates under sixteen heads, lettered (a) to (p), the grounds upon which a patent may be revoked. These include all the stereotyped pleas long familiar in patent practice which have now been given statutory recognition. The subsection concludes with the words :

or upon any other ground upon which a patent might, immediately before Jan. 1, 1884, have been repealed by *scire facias*.

The respondents' attack on the present letters patent appears to fall under (e) and (f) of the enumerated statutory pleas, the former being "that the invention is not new" and the latter "that the invention is obvious and does not involve any inventive step having regard to what was known or used prior to the date of the patent."

The issue between the parties in your Lordships' House is thus within a narrow compass, but in part owing to the complexity of the branch of science involved and in part owing to the importance, difficulty and novelty of the points of law raised in argument, the hearing occupied twelve and a half days. Their Lordships are indebted to counsel for their assistance in elucidating, both by exposition and by debate, a case of unusual subtlety. In order that the nature of the problem which the patent in suit professes to solve might be rendered intelligible, your Lordships enjoyed the educative advantage of an elaborate scientific exposition by Sir Stafford Cripps of the theory and principles of wireless transmission, and in particular of the behaviour of electrons in the discharge tubes, or valves as they are more commonly called, which play an essential part in the process. Fortunately it is not necessary to set out this exposition at length, for the judgments of ROMER and MAUGHAM, L.JJ., are each prefaced with a most lucid account of the matter to whose accuracy counsel on both sides agreed that no exception could be taken, except in a few details immaterial for the present purpose. To this unusual tribute their Lordships must add their own meed of admiration. It should be added that the parties also furnished the House with an agreed compendium of explanations of the scientific principles involved and of the technical terms employed. In these circumstances I should be rash if I attempted to repeat in less felicitous and probably less accurate language of my own what has already been so well expounded, and I adopt all that the learned Lords Justices have said in their scientific explanations. But for the purpose of introducing my own views of the merits of the case I fear I cannot avoid the necessity at whatever risk, of endeavouring to state briefly a few cardinal matters.

At the transmitting end in a wireless station the sound vibrations which it is desired to broadcast are converted into audio-frequency electric waves. Such waves travel comparatively slowly and tend to die away. Accordingly they are superimposed upon or blended with radio-frequency waves of high velocity and carrying power which are generated at the transmitting station and sent out to the world from the aerial there. At the receiving end the impact of these radio-frequency waves, carrying the impress of the audio-frequency waves, causes oscillations in the receiving aerial corresponding to those of the transmitting aerial. But these oscillations are too rapid and too faint to be rendered perceptible to the human ear. They have to be subjected to treatment in order that they may reproduce in the receiving loud-speaker the sounds which impinged on the microphone at the transmitting end. In this process the discharge tube or valve plays a most important part. Its two main functions are rectification and amplification. The incoming wave sets up alternately positive and negative oscillations in the receiving apparatus. These positive and negative oscillations succeed

each other with such intense rapidity that they in effect cancel out. In order to render the incoming oscillations appreciable the negative half of them has to be eliminated and only the positive half passed on into the circuit in which the loudspeaker is situated. The elimination of the negative half of the incoming oscillations is the process of rectification. The oscillations are also so minute that they need to be "amplified." This is accomplished by the communication of reinforcing energy from the batteries of the receiving circuit. The rectified and reinforced oscillations pass through the circuit, the radio-frequency waves are by-passed and the audio-frequency waves reach the loudspeaker where they cause audible vibrations which reproduce the audible vibrations of the microphone at the transmitting end. The discharge tube or valve is a vacuum glass bulb which in the simplest form of a diode contains a filament called a cathode and an adjoining or surrounding metallic plate called an anode. The filament is connected through the neck of the bulb with a battery, the current from which renders it hot and causes it to emit negative electrons. The anode is connected with the aerial from which it receives high frequency oscillations alternately negative and positive. When positive it attracts the negative electrons emitted by the cathode; when negative it repels them. Thus if such a valve be introduced into a circuit at the receiving end, only one half of the oscillations received from the aerial will be permitted to pass. The discharge tube acts like a valve—it permits flow in one direction only and stops flow in the other direction. The unidirectional stream of electrons passing from the anode to the cathode is called the anode current. A diode valve such as I have described could only rectify, it could not amplify.

The next stage was the introduction into the valve of a grid or meshed metal cylinder between the filament or cathode and the plate or anode. This control grid, as it was called, was connected with the aerial and received the oscillations which the aerial communicated. The anode was no longer connected with the aerial but was kept at positive potential by the operation of a battery with which it was connected and therefore continually attracted the negative electrons emitted from the heated filament or cathode. This triode valve could be used as an amplifier as well as a rectifier, for the control grid being connected up with a battery the oscillations communicated to it from the aerial could be utilised to cause a discharge of current from the battery so as to reinforce the current passing from the cathode to the anode. The unidirectional anode current was thus maintained between the cathode and the anode, and it was affected en route by the control grid through which it passed, and which received the oscillations from without. But there were defects affecting the triode in operation. When used for amplifying, as the letters patent tell us, the interaction of the control grid and the

anode tended to diminish the anode current for technical reasons which it is not necessary further to describe. To obviate this disadvantage another grid, called a screening grid, was introduced between the control grid and the anode and maintained at a fairly high positive potential. This positive screen grid helped the anode current on its way to the anode by adding to the positive draw of the anode on the negative electrons and enabled an appreciably negative bias to be given to the control grid, which was said to be of advantage in a final amplifier. Valves containing two grids interposed between the cathode and the anode are called tetrodes. Such valves were known at the date of the patent in suit, though they were not in practical use. In such a valve the two grids interposed between the cathode and the anode are identical in construction. One of them may be used as the control grid and the other as a screen grid, indifferently. It all depends upon how they are connected up outside the bulb. The grid next to the cathode may be utilised as the control grid and the grid next to the anode as the screen grid or vice versa. In the former case the valve is called a space-charge tetrode; in the latter a screen-grid tetrode. Regarded as an article, apart from the potentials communicated to the grids from outside the valve, it is not possible to say whether a particular tetrode valve is a space-charge tetrode or a screen grid tetrode. But the patentee is concerned only, as he tells us in his specification, with the case where the grid next to the anode is used as a screen grid and the grid next to the cathode is used as the control grid, or, in other words, with a tetrode used as a screen-grid tetrode. Quite different phenomena arise when the tetrode is used as a space-charge tetrode, as explained by Professor Appleton in his monograph on "Thermionic vacuum tubes," chap. IX, which was made evidence in the case. Now a tetrode when used as a screen-grid tetrode, if employed as the final valve in an amplifier, has a serious drawback affecting the anode current, as the patentee also informs us in his specification.

It appears that the negative electrons emanating from the heated cathode, when they reach and impact upon the positive anode, cause the anode to give off what are called secondary electrons, which are as it were "splashed" up from the anode. There is thus both a stream of primary electrons arriving at the anode and an output of secondary electrons in the opposite direction from the anode. It is rather like what happens in a heavy shower of rain; there is the fall of raindrops on the pavement and a splashing up of drops from the pavement. The disadvantage arising from the introduction of a screen grid between the grid used as the control grid and the anode is thus described by the patentee:

If, however, such a so-called final valve or power valve is used in an amplifier the phenomenon occurs that when the anode potential decreases the screening grid

current increases at the expense of the anode current, and that when this potential fall becomes so large that the anode potential becomes inferior to the potential of the screening grid, secondary electrons will pass from the anode to the screening grid, whilst, moreover, part of the primary electrons between the screening grid and the anode will reverse their directions, returning to the screening grid. These phenomena result, some to a greater extent and others to a smaller extent, in the screening grid current increasing at the expense of the anode current so that the advantage incidental to the use of the screening grid is again largely lost.

Having thus explained how the anode current is detrimentally affected in the case of a tetrode, when the two grids interposed between the cathode and the anode are employed respectively as a control grid and a screen grid in that order, the specification proceeds to set out the nature of the invention which is said to get over this disadvantage, and it is again best to quote the patentee's own language as follows :

The invention is based on the recognition of the phenomena just mentioned and consists in providing means which will ensure, as in the examples stated below, that when the anode potential falls below the potential of the screening grid the increase of the screening grid current at the expense of the anode current will be substantially avoided.

The present invention comprises a circuit arrangement for amplifying electric oscillations by means of one or more thermionic discharge tubes connected in series or cascade, characterised in that the discharge tube of the last stage of amplification comprises a screening grid kept at a constant high potential between the control grid and the anode and that such discharge tube is so arranged by the introduction of an auxiliary grid kept at a constant and relatively low potential that when the anode potential falls below the potential of the screening grid the increase of the screening grid current at the expense of the anode current will be substantially avoided.

I pause here to point out that the proposal assumes that inside the discharge tube or valve there are already two grids interposed between the cathode and the anode and that the grid nearest the anode is being used as a screen grid and the grid farther away from the anode as a control grid. Into this series of grids it is proposed to introduce yet another or auxiliary grid, between the grid used as a screen grid and the anode and this auxiliary grid, or "suppressor grid" as it has come to be called, is to be "kept at a constant and relatively low potential." "Relatively low" means low relatively to the potential of the anode. If a discharge tube having the features indicated is utilised in the last stage of amplification in a circuit arrangement for amplifying electric oscillations, then there will be substantial avoidance of the disadvantage of the screening-grid current increasing at the expense of the anode. It is highly important to note that the new grid is to be introduced in the sequence of grids so that the series will be in order of proximity to the anode, (i) the new grid, (ii) the grid employed as a screen grid, and (iii) the grid employed as the control grid.

The specification then proceeds :

The invention also comprises a discharge tube having at least three auxiliary

electrodes between the cathode and the anode, characterised in that the auxiliary electrode nearest to the anode is directly connected to the cathode so as to be maintained continuously at the cathode potential.

Here, be it observed, the patentee is describing as his invention not a circuit arrangement including a discharge tube in which three grids are by means of the potentials communicated to them utilised in a particular order and manner, but simply a discharge tube in which only one of the three material grids is described, namely the one next to the anode, and all that is said of that grid is that it is to be directly connected to the cathode. The specification proceeds to describe in detail the accompanying drawings "in which some circuit arrangements and tube constructions according to the invention are diagrammatically illustrated by way of example," and then proceeds :

To sum up, the invention therefore comprises means by which, in the case of a final amplifier, which comprises a screening grid between the control grid and the anode, the screening-grid current is prevented entirely or partially from increasing at the expense of the anode current when the anode potential falls.

Having thus "particularly described and ascertained the nature of the said invention and in what manner the same is to be performed" the patentee declares what he claims. It is necessary to refer only to claims 1, 2 and 5, but these must be set out textually. They are as follows :

1. A circuit arrangement for amplifying electric oscillations by means of one or more thermionic discharge tubes connected in series or cascade, characterised in that the discharge tube of the last stage of amplification comprises a screening grid kept at a constant high potential between the control grid and the anode and that such discharge tube is so arranged by the introduction of an auxiliary grid kept at a constant and relatively low potential that when the anode potential falls below the potential of the screening grid the increase of the screening-grid current at the expense of the anode current will be substantially avoided.

2. A discharge tube having at least three auxiliary electrodes between the cathode and the anode characterised in that the auxiliary electrode nearest to the anode is directly connected to the cathode so as to be maintained continuously at the cathode potential.

5. The discharge tube substantially as described.

The distinction between claim 1 and claim 2 is obvious. Claim 1 is for a circuit arrangement ; claim 2 is for a discharge tube or valve. Claim 1 describes with precision the special feature of the circuit arrangement claimed—namely, that the discharge tube of the last stage of amplification in the circuit shall have an auxiliary grid, kept at a constant and relatively low potential, interposed between a screening grid, kept at a constant high potential, and the anode, the control grid being on the further side of the screening grid from the anode. Starting with the anode the order of arrangement in the discharge tube is to be as follows : (i) anode, (ii) auxiliary grid or "suppressor grid," kept

at a constant and relatively low potential, (iii) screening grid kept at a constant high potential, (iv) control grid, and (v) cathode. The three grids may physically be identical as pieces of meshed metal, but it is of the essence of the claim that they should have characteristic potentials imparted to them which give them their functional importance in relation to the anode current. The auxiliary grid or "suppressor" is to have a potential "constant and relatively low"; the screening grid is to have a "constant high potential"; the potential of the control grid, being the grid which receives the oscillations communicated from the outside by the aerial, naturally varies.

Now it was conceded that a circuit arrangement comprising a discharge tube with the features described would work and would work usefully, that is to say, that it would amplify oscillations efficiently. But it was maintained that it lacked subject matter in respect that it embodied no inventive idea, and also that the idea which it embodied was not novel. It is true that the mere introduction of additional grids in a discharge tube, the mere multiplication of the number of grids in such an article, may well be said to be an obvious thing. But the evidence goes to show that the discovery which led to the taking out of the letters patent was not the discovery of an obvious fact. The discovery was that if an auxiliary grid of a potential which was low relatively to that of the anode was interposed between the screen grid and the anode, it not only would cause the secondary electrons emanating from the anode to return to the anode, but would also not prevent the primary electrons from proceeding on their way to the anode. It was more or less obvious that such an auxiliary grid so placed would send back the secondary electrons to the anode, but both Professor Appleton and Mr. Meyer said that they were surprised to find that it did not impede the passage of the primary electrons. It was evidently the common belief that it would act as a barrier to the passage of the primary electrons, and consequently no one thought of trying whether it would in fact do so until the present inventor had the originality to make the experiment and found that an auxiliary grid so situated and at such a potential did not interrupt the flow of the primary electrons. The respondents adduced no evidence, and the evidence of Professor Appleton and Mr. Meyer stands uncontradicted. Neither of them expected that an auxiliary grid so placed and of such a potential would not interfere with the passage of the primary electrons, both of them were surprised that in fact it did not. It was the discovery of this fact that made it feasible to interpose a grid of relatively low potential between the screen grid and the anode with the beneficial results indicated. The respondents sought to minimise the evidence of Professor Appleton and Mr. Meyer, and indeed maintained that these distinguished experts ought not to have been surprised. But the fact remains that they were surprised

and no one has questioned the honesty of their evidence. Nor have the respondents put anyone in the box to say that he was not surprised. In these circumstances I find myself in agreement with ROMER and MAUGHAM, L.JJ., who both thought that there was subject matter in the invention to which claim 1 relates. As regards the attack upon the ground of want of novelty, which was based on Schonland's communication to the Royal Society, it is enough for me to say that I am not in agreement with LORD HANWORTH, M.R., and that, with ROMER, L.J., and for the reasons which he assigns, "I am not prepared to hold that Schonland's solution of his own problem made the solution of the patentee obvious."

So far so good. The patentee had made a new and useful discovery which he fully described and disclosed in his specification and for which he was entitled to claim protection. In claim 1 the description of what he there claims corresponds with what he has told us that he has invented. Agreeing with FARWELL, J., and the majority of the Court of Appeal, I am of opinion that claim 1 may be upheld as being for an invention which possesses novelty, utility and subject matter, and that this claim successfully survives the attack upon it. The detailed consideration which I have given to claim 1 and which it has also received below, although that claim is not alleged to have been infringed, is not irrelevant to the question of the validity of claim 2 to which I now address myself, for it has served to show clearly the nature and scope of the patentee's invention which justified claim 1, and will also serve to point the contrast with what is claimed in claim 2, to the consideration of which I now pass. Each claim appended to a specification must be considered independently of all the other claims. It must be able to justify itself on its own independent merits. But like all the claims it must be read in the light of the specification. If, then, claim 2 is read by itself, as it ought to be, it will be seen to be a claim for an article, not for a method or process. That there may be a good claim for an article is accepted law. But the article claimed must be a patentable article, that is to say, it must satisfy all the tests of validity which the law applies to an invention. It does not follow from the fact that an article may be the subject of an invention that every claim for a new article is good.

Now discharge tubes were well known articles before this patent was taken out, and the insertion of grids or auxiliary electrodes between the cathode and the anode was no novelty. The virtue of the claim must reside, if anywhere, in the characteristic feature that in the discharge tube claimed the auxiliary electrode nearest to the anode is directly connected to the cathode. If the claim is good, no one can without infringement make or sell a discharge tube containing three or more electrodes in which the electrode nearest the anode is directly connected with the cathode. Is the patentee entitled to such a monopoly? He

is entitled to say that a discharge tube so constructed is new, for discharge tubes with such a connection were not previously known or made; and he is entitled to say that such a discharge tube has patentable utility in the sense that it can be used and will work as a discharge tube. But is the claim justified by the inventive idea which the patentee has disclosed? A patentee may make a most meritorious discovery and may give an entirely adequate description of his inventive idea and of the manner of putting it into practice, but when he comes to formulate the claim to his invention he may claim a monopoly wider in extent than is warranted by what he has invented. The patentee has told us quite definitely that his invention deals with the case of a final amplifier which comprises a screening grid between the control grid and the anode, and that he has invented means by which, in such a case, the screening-grid current is prevented entirely or partially from increasing at the expense of the anode current when the anode potential falls. The problem which he set out to solve and the disadvantages which he professes to overcome relate solely to discharge tubes with a screening grid between the control grid and the anode. His discovery was that if in a discharge tube with a screening grid between the control grid and the anode he inserted between the screening grid and the anode an additional "suppressor" grid, he achieved the advantageous results which he describes. That is the ambit of his invention and for that he is entitled to protection. But claim 2 makes no reference to screening grids or control grids at all. It simply speaks of three or more electrodes irrespective of their function as screening grids or control grids or suppressor grids or of their arrangement relatively to each other. Now it is quite true that, regarded simply as pieces of meshed metal, a screening grid, a control grid and a suppressor grid may be indistinguishable, and that a grid may serve as a screening grid, a control grid or a suppressor grid according to the potential communicated to it. But if that is so, then the three or more electrodes which the discharge tube claimed is to contain may be so used that the grid used as a screening grid is not between the grid used as the control grid and the anode. In a discharge tube in which the electrodes are so used the connecting of the grid nearest to the anode with the cathode will not achieve the object of the invention, which has solely to do with discharge tubes which comprise means for preventing the screening-grid current "entirely or partially from increasing at the expense of the anode current when the anode potential falls." This will not be achieved unless the suppressor grid is placed between the screening grid and the anode. It was submitted that in a claim for an article it is sufficient to establish that the article is capable of being used to perform the invention, and that it is nothing to the purpose to show that it may also be used or abused in ways which do not perform the invention or which achieve some

other and different results, unless it can also be shown that the article claimed will not in certain circumstances work at all. But when an article is claimed its virtue must reside in itself. It must always be capable of giving the advantages which the patentee has told you may be expected from its use. A discharge tube having three or more electrodes, of which the one nearest the anode is directly connected with the anode, will not give the advantage which the patentee discovered and described, unless the electrodes in its vicinity are used to perform particular functions in a particular order of arrangement. The article claimed is a discharge tube in which by virtue of its construction the grid nearest the anode will always be kept at the same potential as the cathode, and its construction will no doubt always ensure this. But the inventor's purpose was not to invent a discharge tube which should have this feature. If his problem had been to invent a tube in which the grid nearest the anode should always be at cathode potential, his problem could have been easily and obviously solved. Anyone could have told him that all he had to do was to establish a physical connection between the grid nearest to the anode and the cathode. His problem was to obviate disadvantages which arose when a screening grid was interposed between the control grid and the anode, a quite special and definite problem. I do not think that he is entitled to prevent anyone in future from making a valve in which the grid nearest to the anode is connected with the cathode merely because he has discovered that in a valve in which the other grids are utilised in a particular way this connection will give the special advantage which he discovered. It is because he has sought to do so by claim 2 that that claim is in my opinion too wide. The fact that an article of obvious construction is discovered to give a valuable and new benefit if employed in a particular way does not entitle the discoverer to prevent everyone else from making that article. A patentee is granted his monopoly in order to protect the invention which in his specification he has communicated to the public. He is not entitled to claim a monopoly more extensive than is necessary to protect that which he has himself said is his invention. In the present case I think that in claim 2 the patentee has claimed more than his inventive idea entitles him to protect. He has not earned the right to say that no one else shall be permitted in manufacturing valves to connect the electrode nearest the anode with the cathode. What his inventive idea communicated to the public entitled him to protect was his discovery that if he effected this connection and if the electrode so connected was placed between a screening grid and the anode, the screening grid current would be prevented from increasing at the expense of the anode current. If an inventor claims an article as his invention, but the article will only achieve his avowed object in a particular juxtaposition and his inventive idea consists in the discovery that in that particular

juxtaposition it will give new and useful results, I do not think that he is entitled to claim the article at large apart from the juxtaposition which is essential to the achievement of those results. It was argued for the appellants that if an article is new, is useful and has subject matter then it is necessarily patentable and entitled to protection. But a claim may be for an article which is new, which is useful and which has subject matter, yet it may be too wide a claim because it extends beyond the subject matter of the invention. The consideration which the patentee gives to the public in disclosing his inventive idea entitles him in return to protection for an article which embodies his inventive idea, but not for an article which, while capable of being used to carry his inventive idea into effect, is described in terms which cover things quite unrelated to his inventive idea, and which do not embody it at all. This is what I take MAUGHAM, L.J., to mean when he says that "Claim 2 is not co-extensive with the inventive step," and in that sense I agree with him.

It is undoubtedly the case that a claim may be too wide, in the sense that it claims protection for that for which the patentee is not entitled to protection, or that it gives him a wider protection than his discovery entitles him to receive. In the present instance the patentee has claimed a monopoly of all valves with a certain feature of construction, although the merit of his invention does not lie in that feature but in the utilisation in a particular and limited way of a valve containing that feature of construction. In so doing he has, in my opinion, over-reached himself and his claim is wider than the law will support. I need add nothing to what has been said in the Court of Appeal as to the consequential invalidity of claim 5. I accordingly concur in the motion that the appeal be dismissed with costs.

LORD ALNESS [read by LORD MACMILLAN]: My Lords, there can be no doubt that on the fringe of the controversy in this case, lie many obscure and difficult problems, which, however, I apprehend, call for no solution to-day. It is necessary to get to the heart of the problem which confronts us, and which here and now must be solved. The case is one in which at first it was difficult to see the wood for the trees. But eventually, thanks to the exposition of law and of fact to which your Lordships had the advantage of listening from the bar, the real problem for solution has been elucidated and narrowed; and, in the result, I think it is true to say that, in statement, though not perhaps in solution, that problem may in substance be deemed to be simple. I must own, however, that, if I were sitting alone, I should feel some difficulty in solving the problem along the lines followed in the courts below, and in concurring with the judgments there delivered. But, having had the benefit of consulting with your Lordships, of reading and re-reading the evidence and the

judgments appealed against, and of studying the arguments addressed to us from the bar, I feel constrained to concur in the result at which your Lordships, in common with the courts below, have arrived, and to hold that the appeal must fail.

At this time of day, delivering the seventh concurring judgment on the validity of claim 2 of the appellants' specification, which formed the spearhead of the respondents' attack, it would, I think, be otiose and worse, were I to re-attempt to re-survey the field of science and of law which has already been judicially covered. This has, if I may venture to say so, been adequately and admirably done in the judgments appealed against. Indeed, were it not for the importance of the matters in issue, and for the pressure of Sir Stafford Cripps' argument, I should be well content to say that I concur in the opinion of my noble and learned friend LORD MACMILLAN, with which I find myself in complete accord. But, having regard to the considerations to which I have adverted, I feel bound—with, I hope, becoming brevity—to express in my own words the conclusion at which I have ultimately arrived, and the reasons upon which that conclusion is based.

Let me first, however, clear the ground. This case is concerned with claims 1, 2 and 5 of the appellants' specification. I concur with the opinions expressed in the courts below to the effect that claim 1 of the specification is valid, and with the grounds of that decision. I also concur with the majority in the courts below in thinking that the appellants' invention has not been anticipated by any prior document. The only prior document on which in this regard the respondents relied as anticipating the appellants' patent was Round's specification, and I agree with the courts below in thinking that their contention in this matter is ill-founded. I concur also with the courts below in thinking that claim 5 of the appellants' specification is bad for the reasons assigned in the judgments under appeal. I may add that the validity of this claim was but faintly argued by Sir Stafford Cripps. I also think that the appellants' specification discloses a new, useful and indeed unimpeachable invention. Where I part company with the appellants is this—that, confining myself to claim 2, I am of opinion that the invention and the claim do not equiparate, and that the monopoly claimed by the appellants does not conform with the consideration set out in the specification. The fundamental rule of patent law, as Mr. Whitehead reminded us, has always been that the monopoly claimed must not go beyond the consideration. In my opinion, claim 2 sins against this cardinal rule. The appellants have, I think, claimed more than is necessary for the protection of their patent.

I propose to place, *vis-à-vis* of one another, the invention of the appellants, as described in their specification, and claim 2 appended to it.

(i) The invention.—I agree with Mr. Whitehead in thinking that the specification discloses but one problem and one solution of that problem. The invention is duly set out, and it is neither doubtful nor obscure. It consists, as I understand it, in a screen-grid pentode valve, used as a final amplifier, in which the increase of screen-grid current at the expense of anode current is substantially avoided.

(ii) The claim.—I premise that (a) it is a claim, not as is claim 1, for a circuit, but for a valve, and (b) it falls to be treated as an independent not a relative claim, which must stand, if it is to stand, upon its own base. Counsel for the parties concurred in affirming these propositions.

So regarded, the appellants' claim as was said in the appeal court, is a wide one. Its very width makes it the more vulnerable to attack. The claim is, in my opinion, wider than anything contained in the specification, and goes, as Mr. Whitehead put it, clean outside the problem there said to have been solved. The claim is not limited to a valve having a screen grid ; it is not limited to a valve which is used as a final amplifier ; it is not even limited to a pentode valve. The claim would cover any number of electrodes, inasmuch as no maximum is stated. It would cover valves in which the problem claimed in the specification to have been solved does not arise. The claim is, in short, what I might term—while disclaiming any sinister interpretation of the word—a covetous claim, which cannot in law be successfully defended. In these circumstances I respectfully concur in the motion which has been moved from the Woolsack.

LORD ROCHE : My Lords, the subject matter of this litigation is abstruse and difficult. But counsel on both sides rendered the greatest assistance by the exactitude and patience of their explanations, and I should like to be permitted to join with your Lordships who have already spoken, in expressing at once my gratitude to counsel. The subject matter being thus explained the actual point for decision became well defined and comparatively short in compass. That is not to say it is easy of decision. My Lords, I am of opinion that the judgments and orders below were right and should be affirmed. I am so much in agreement with the reasoning of the opinion of my noble and learned friend LORD MACMILLAN, which I have had the advantage of perusing, and of the judgments delivered in the Court of Appeal that I should be content to adopt such reasoning and say no more ; but having regard to the ability and force of the argument for the appellants, I think it right to make certain additional observations upon considerations which satisfy my own mind that this appeal should be dismissed. Out of the matters dealt with in the masterly recital of the scientific facts and principles involved, which is contained in the judgment of MAUGHAM, L.J., I only desire to mention for my own particular purpose the following matter.

In the monograph of Professor Appleton on thermionic vacuum tubes which was in evidence there is to be found at the beginning of chap. IX this passage :

The tetrode : Thermionic tubes with two grids and thus four electrodes in all are known as tetrodes and fall into two well marked classes according to whether the grid nearer the anode or the grid nearer the filament is used as the control electrode.

The writer then proceeds to describe the two classes or types of tube or valve under the names of the space-charge-grid tetrode and of the screen-grid tetrode, and then to describe the pentode (of course, in the light of the plaintiffs' work) as possessing a screen grid with an additional grid situate between the anode and the screen grid. The substance of the objection to claim 2 of the plaintiffs' specification is that whereas the plaintiffs' invention related to and related solely to a screen-grid tube the claim extended to cover an area which included one known and different thing which was in use at the date of the patent in suit, namely, the space-charge-grid tube and any number of other things and combinations which might in the future come into existence and be essentially different in character from a screen-grid tube. In short, the claim was more extensive than the invention and was as it is compendiously expressed too wide and therefore invalid. If the premises are correct, I cannot doubt that the conclusion is correct also. The authority of LORD ELDON in *Hill v. Thompson* (1), and of LORD LOREBURN in the *Ingersoll* case (2) in the passages quoted by LORD HANWORTH, M.R., in his judgment in the present case seems to me to be clear on this point—see also *Gandy v. Reddaway* (3) and *Dick v. Ellam's Duplicator Co.* (4), at p. 200. I would also refer to the decision of the Court of Appeal in *Woodrow v. Long, Humphreys & Co., Ltd.* (5). I have said above that the space-charge-grid tube was in use at the date of the patent in suit. The authority for this statement is the evidence of Mr. Meyer, at p. 184, of the record question 838.

As to the scope of the actual invention : in my judgment MAUGHAM, L.J., was correct in saying that no question of onus of proof is involved in this matter. The plaintiffs by their specification, by their evidence and statements at the bar before FARWELL, J., and by their case in your Lordships' House put the matter beyond any doubt. The specification is clear throughout and I need not repeat what was said in the judgments in the Court of Appeal with regard to it. With regard to the case made before FARWELL, J., perhaps the most significant passage—though the evidence is all to the same effect—is where Mr. Meyer adopts the statements made by counsel for the plaintiffs as to the importance of specifying what are the potentials at which the electrodes are kept and what are

their relations to one another. The appellants' case is explicit. Under the heading of "The invention": para. 24 reads thus:

The present inventor appreciated that it might be possible so to alter the screen-grid tetrode as to avoid the detrimental features already mentioned. In order to accomplish this he proposed to insert between the screen grid and the anode a fifth electrode in the form of a third or so-called "suppressor" grid kept at a low potential, preferably that of the cathode.

That being the invention as described by the plaintiffs I pass to consider the method of claiming protection for it. In the view I take of claim 2 it is unnecessary to consider whether claim 1, of which no infringement is alleged, is open to objection on other grounds, as LORD HANWORTH, M.R., thought it was; but at any rate as regards this point of description it is explicit. Claim 1 is described as a claim for a circuit arrangement of

discharge tubes connected in series or cascade characterised in that the discharge tube of the last stage of amplification comprises a screening grid kept at a constant high potential between the control grid and the anode and that such discharge tube is so arranged by the introduction of an auxiliary grid kept at a constant and relatively low potential that . . . the increase of the screening-grid current at the expense of the anode current will be substantially avoided.

In short, the claim is for a circuit arrangement with a final discharge valve which is an improved screen-grid valve. How different is claim 2 which is for:

a discharge tube having at least three auxiliary electrodes between the cathodes and the anodes characterised in that the auxiliary electrode nearest to the anode is directly connected to the cathode so as to be maintained continuously at the cathode potential.

All reference to the screening grid which is present in claim 1 is absent from claim 2. It is said for the appellants that claim 2 is simply a claim for an article which may be, so to speak, lying on a shelf and not for an article in a circuit. It is said that the judgments in the Court of Appeal failed adequately to recognise this and were based on a mistaken view that even if they were regarded as mere articles and not in a circuit, screen-grid valves were different from space-charge-grid valves. In my view the Court of Appeal fell into no such error. I have no doubt that the tribunal knew quite well that as mere collections of metal and glass and other materials the valves would look and be alike. What was held was that, whereas the invention was of an article characterised by the position and potentials of its electrodes in a circuit, the claim did not describe such an article and was therefore bad. In this I think the Court of Appeal was right.

It remains to give my reasons for sharing the view of the Court of Appeal upon this conclusion from the premises as to the nature of the

invention and the nature of the claim. The Patents and Designs Act, 1907, s. 2 (4) provides :

A specification, whether provisional or complete, must commence with the title, and in the case of a complete specification must end with a distinct statement of the invention claimed.

The title of this specification is "Improvements in or relating to circuit arrangements and discharge tubes for amplifying electric oscillations." The contents of claims 1 and 2 which end the complete specification I have already stated. On grounds of law two main contentions were raised in objection to the judgments in the Court of Appeal. The first was that they seemed to require the inventive step to be stated in the claim and that was not necessary. The second was that they seemed to require the purpose or use of the article claimed for to be stated in the claim and that was not necessary. In my view the Court of Appeal did not make such requirements but something different, and in the circumstances something that was essential to the validity of the claim. It is true that an inventor need not state in a claim the reasons that have led him to his invention, or the stage or stages by which he has arrived at it. But the essential characteristics of his actual invention he must state. As to use or purpose it seemed to be contended for the appellants that to include it in the claim was always unnecessary and even inadmissible. Cases were cited in support of this contention, but I do not think they support it. There are cases which show that such inclusion in the circumstances under consideration in those cases was surplusage or was unavailing to better a claim. Thus, in the case of *Adhesive Dry Mounting Co., Ltd. v. Trapp & Co.* (6), a claim for an article for a new use was held not to be valid when the article itself was the subject of a prior patent and was therefore anticipated. But PARKER, J., who heard the case and so decided, added that the idea of user for an entirely new purpose might have been good subject matter for a claim. In other words, the article was not the thing invented and was not the proper subject matter for the claim. The case of *Fawcett v. Homan* (7), decided by the Court of Appeal in 1896 is of some importance. There a claim for an improved brick lintel to be used in flooring construction was held good because of the new function discovered and assigned to a lintel which in itself was not a novelty. The function or purpose was to be found in the title of the specification. The true principle I conceive to be this : that some articles when seen or described speak for themselves, and further description as to function or purpose is needless. On the other hand, in some cases function is part of the invention, and in such cases it not only can but must be included in the description to secure the validity of a claim.

Turning to the present case, there is one matter which as it appears

to me is of great significance in its bearing on the contention of the appellants that here, the article itself being the subject of the claim, statement of function is unnecessary. One of the objections to the claim made by the respondents' counsel was that it was too wide because it was not limited to a valve used as a final amplifier. To this the appellants' counsel replied that the objection was wrong in fact because the claim was to be interpreted as limited by the title and therefore could not include valves for other purposes than amplifying. As I see it this answer may be a good answer to the particular objection, but it also seems to undermine the whole foundation of the appellants' case. This is indeed description by function or purpose. How would one of these valves differ as an article from another according to an intended user for amplifying or for something else? The answer I conceive to be not at all if they are regarded so to speak as mere dead things and not so to speak as things functioning, that is to say, in a circuit. No discharge tube or valve can amplify save in an electric circuit. If reference to function is therefore necessary mere reference to amplifying derived from the title is clearly, as I think, an inadequate description of the invention. At the risk of repetition I state my view to be that, whereas the invention was of a valve of a particular kind distinguished from other valves by the position and potentials of its various electrodes in a circuit, in claim 2 the major part of the characteristics of the invention find no place. Moreover, if function be thus an essential element in the invention and the claim be for an article unrelated to function, then it is, I think, illegitimate to resort to the body of the specification to find the invention and thence derive subject matter for the claim. In this case the article in question is in effect described in the claim as a discharge tube—with one of its three or more auxiliary electrodes which is nearest to the anode directly connected to the cathode. I note in passing that the claim continues thus: "So as to be maintained continuously at the cathode potential," which again appears to be a reference to function though an inadequate reference in that it deals with the position and potential of one electrode only. I therefore disregard it as the appellants contend such statements should be disregarded. What is left is a description of a device which is, I think, unessential and obvious. I base my opinion on two matters, on the specification and on the evidence for the plaintiffs. The effect of the narrative part of the specification is to treat the making of the connection between the auxiliary grid and the cathode as something which may but not which must be done to secure a desired result. The evidence I refer to is that of Mr. Meyer. It follows that in my judgment if the claim be regarded as a claim for the mere article as described there is no subject matter. But for reasons I have already stated I think the claim ought to have described the actual invention which was related to function, and not having done so

was bad both from the point of view of subject matter and for non-compliance with the requirements of sect. 2 of the statute to which I earlier referred.

Certain subsidiary points perhaps deserve passing mention. It was said for the appellants that failure to describe was not properly raised by the respondents' pleadings. In my view the material facts were adequately stated and the rules of pleading thus complied with. The powers and duties of the court, if such a matter is not raised in the pleadings but appears on the hearing, are therefore not in question all the more because the excessive width of the claim also results in a want of subject matter which was admittedly raised by the pleadings. At the same time I feel it right to intimate my view that, where a claim covers more than or something different from the actual invention, there is a failure to comply with the law as now expressed in the statute (sect. 2), and that since the Crown as the grantor of monopolies is concerned, the matter is one of which the court can of its own motion take notice. LORD LOREBURN, L.C., used language in the case of *National Colour Kinetograph Co., Ltd. v. Bioschemes, Ltd.* (8), at p. 266, which, though used in reference to ambiguity, is in my opinion also applicable to the widely drawn claim in the present case. LORD LOREBURN, L.C., said :

Some of those who draft specifications and claims are apt to treat this industry as a trial of skill, in which the object is to make the claim very wide upon one interpretation of it, in order to prevent as many people as possible from competing with the patentee's business, and then to rely upon carefully prepared sentences . . . which, it is hoped, will be just enough to limit the claim within safe dimensions if attacked in court. . . . This is all wrong. It is an abuse which a court can prevent, whether a charge of ambiguity is or is not raised in the pleadings.

Ambiguity which was in question in that case is but one form or species of the genus wrong description. Excessive width of claim which is here in question is another, and in many cases it may be a more mischievous offence against the statute than ambiguity. It is to be observed that I am not dealing with insufficiency of description in the sense of insufficiency of working directions in the specification. That point does not arise here, nor are the rules of pleading with regard to it under consideration. It was also urged for the appellants that on the merits there was a hardship, if owing to a defect of form protection could not be secured in respect of the actual valve on sale as an article not in a circuit. The matter is not really relevant to the decision of the case, but I do not regard the matter as one of form. It is to be observed that, having regard to the amendments of the specification, it is clear to my mind that the inventors advertently permitted themselves a width of claim which for reasons, some of which are referred to by ROMER, L.J., may be highly inconvenient and mischievous. In the view I have formed of the case it is not material to discuss claim 5

but its language which was but faintly defended at the bar throws some light on the width of the protection which it has been attempted to secure. Further, and particularly having regard to the point as to amplifying purposes and the consequent limitation of the claim proposed by the appellants themselves, it appears to me that the supposed hardship is more apparent than real. I gathered from the demonstrations given to your Lordships, even if it were not permissible to know without such demonstrations, that valves such as are now in question are commonly placed and sold in sets, and I should suppose that with a claim covering the real invention, such invention could be effectively protected, inasmuch as infringements by dealers in sets could be proved and prevented when the stage of offer for sale in a set had been arrived at. Be that as it may, I am unable to come to any other conclusion than that which I have expressed and sought to explain, namely, that claim 2 of the patent in suit is invalid, and that this appeal should be dismissed.

Appeal dismissed with costs.

Solicitors : *Bird & Bird* (for the appellants); *Faithfull, Owen & Fraser* (for the respondents).

[*Reported by* MICHAEL MARCUS, Esq., *Barrister-at-Law.*]

Re ANCHOR LINE (HENDERSON BROTHERS), LTD.

[COURT OF APPEAL (Lord Wright, M.R., Romer and Greene, L.JJ.),
June 30, 1936.]

Sale of Goods—Agreement giving use subject to payment of interest and depreciation—Whether sale with provision for instalments or agreement to sell—Passing of property.

A shipping company A. succeeded a shipping company B. as occupiers of a basin, and agreed to take over a crane from B. on the following terms : Deferred purchase price £4,000, annual payments of "interest" and "depreciation," the total amount paid for depreciation to be deducted from purchase price on completion of purchase, whenever that might take place, A. to have entire charge of and responsibility for the crane. A. paid regularly for some years and then went into liquidation, and the liquidator contracted to sell the assets, including the crane, to a new company. B. maintained that the property in the crane had not passed to A., and claimed that the liquidator should either adopt the contract or pay the remainder of the purchase price :—

HELD : (i) the property in the crane had not passed to A.

(ii) the liquidator, as an officer of the court, must be assumed to have intended to put himself in a position in which he could give a good title to a purchaser of the crane, and this he could only do by paying the amount of the purchase price outstanding.

[EDITORIAL NOTE.] The contract here is in form very like a contract of sale, with a provision for payment of the price by instalments. It is, however, held to be only an agreement for a sale and the payments for interest and depreciation are not to be regarded as instalments of the price.

AS TO THE DISTINCTION BETWEEN A CONTRACT OF SALE AND AN AGREEMENT FOR SALE, see HALSBURY, 1st Edn., Vol. 25, Sale of Goods, pp. 117, 118, para. 225, and FOR CASES, see DIGEST, Vol. 39, pp. 358-360, Nos. 1-12.]

Cases referred to :

- (1) *Kirkham v. Attenborough*, *Kirkham v. Gill*, [1897] 1 Q.B. 201 ; 39 Digest 508, 1252.
- (2) *Re Levi & Co.*, [1919] 1 Ch. 416 ; 10 Digest 996, 6907.
- (3) *McEntire v. Crossley Brothers*, [1895] A.C. 457 ; 39 Digest 483, 1033.

APPEAL from an order of EVE, J., made on Nov. 29, 1935, dismissing a summons taken out by the Ocean Steamship Co., Ltd., against the liquidator of the Anchor Line (Henderson Brothers), Ltd., under the Companies Act, 1929, s. 192 (5).

The Anchor Line took over from the Ocean Steamship Co., Ltd. (whose agents were Alfred Holt & Co.) a berth at Yorkhill Basin, Glasgow, in which the Ocean Company owned an electric crane. In 1929 they proposed, and the Ocean Company agreed, that they should take over the crane at a price not exceeding £6,000, provided Yorkhill Basin was allocated to the use of their steamers. No arrangement was concluded until 1931. An agreement was then concluded in the following terms :

(1) We agree that you take over the crane, coaling cradle and carriage, and the electric cable serving the crane, for a deferred purchase price of £4,000.

(2) Until the completion of the purchase you agree to pay us for interest and depreciation at the rates of £350 per annum for the first two years after taking over, £450 per annum for the second two years, and £400 per annum thereafter.

(3) Of these sums, a proportion amounting to £240, or 6 per cent. of the purchase price of the crane, is to be regarded as depreciation, and the total of these annual payments for depreciation is to be deducted from the above-mentioned amount of £4,000 in order to arrive at the balance actually to be paid by you on completion of the purchase, whenever that may take place.

(4) In the meantime you will have entire charge of and responsibility for the crane in every respect.

We suggest that the payments be made quarterly, and that the date for your taking over the crane be fixed as from Sept. 5, 1931.

No date was fixed for the completion of the purchase, but the price would on these terms have been fully paid off after $16\frac{2}{3}$ years. The Anchor Line confirmed these conditions on Sept. 4.

The Anchor Line thereafter made regular quarterly payments until Mar., 1935. It insured the crane. In Apr., 1935, it went into voluntary liquidation. On May 1 a petition was filed for compulsory winding up, and a compulsory winding up order was made on May 13.

On May 11 (two days before) the official receiver contracted to sell all the assets of the company to a new company called Anchor Line (1935), Ltd., including the crane at Yorkhill Basin. The Ocean Company claimed that the property in the crane had not passed to the company, and required the liquidator either to assume the company'

obligation under the agreement or return the crane. The liquidator rejected the claim.

The company then took out a summons asking for an order that the liquidator's decision might be reversed; a declaration that the property in the crane did not pass to the Anchor Line before all the money was paid, and a declaration that the liquidator must be deemed to have adopted the agreement and that the company were entitled either to payment of the whole of the moneys still unpaid or to the return of the crane. EVE, J., in his judgment, agreed with the liquidator that the agreement was an unconditional contract for the sale of specific goods, payment of the purchase price for which was to be deferred until the purchasers were able to carry out the contract. He could not infer from the contract itself that the real intention was other than that expressed, i.e., was different from that which would be inferred from the document on the application to it of the Sale of Goods Act, 1893, s. 18, r. 1. The use of the word "depreciation" did not, he thought, amount to an indication that the property was not intended to pass; nor did the concluding clause placing the responsibility for the crane on the Anchor Line show an intention different from what would be implied without it, although it would naturally have been implied if it had not been expressed. He therefore dismissed the summons with costs. The Ocean Company appealed.

D. P. Maxwell Fyfe, K.C., Harold Brown and Basil Nield for the appellants.

W. P. Spens, K.C., and P. J. Sykes for the respondent.

Maxwell Fyfe, K.C.: The property did not pass to the Anchor Line. These payments are to be made until the completion of the purchase. Depreciation means "loss in value owing to use and wear." If depreciation is only to mean a reduction in the purchase price, and the contract is to run to an end in $16\frac{2}{3}$ years, the interest at the end of the period is extraordinarily high. On the other hand, if the intention is that the whole of the purchase price remains outstanding until the last payment is made, when credit is to be taken from it, then the interest remains at the reasonable figure of 4 per cent. over the whole period. The whole price is then treated as bearing interest, and real payments are made for depreciation; there is not a continual diminution of the amount outstanding. Depreciation remains a vendor's matter, which it would not be if the property had passed.

The Anchor Line are to have "entire charge and responsibility." If the property had passed, the risk would have passed with it and these words would have been unnecessary. See *BENJAMIN ON SALE*, 7th Edn., p. 414. Whether the property passed or not depends on the intention of the parties: *McEntire v. Crossley Brothers* (3).

Spens, K.C.: The court looks at the conduct of the parties and the

circumstances, as well as the form of the contract : Sale of Goods Act, 1893, s. 17. In 1931 the vendors wanted the purchasers to buy the crane. There is so much doubt about what the parties' intention was that a different intention from that expressed in the written agreement cannot be inferred. From 1931 until 1935 the vendors took no interest in the maintenance or insurance of the crane. The parties behaved as though the property had passed.

The document simply indicates that, out of the fixed annual payment that was to be made, an instalment of capital was in fact to be treated as being paid off each year. This is a contract of sale where the time for payment has been postponed, an unconditional contract for the sale of specific goods, and therefore the property has passed to the Anchor Line. The appellants' only remedy is an action for conversion.

Maxwell Fyfe, K.C., in reply : The liquidator is personally responsible to settle the whole of the outstanding balance, and charge it in the liquidation against the assets : *Re Levi & Co.* (2). The liquidator can only properly take and sell the crane to the new company by paying the outgoings for the crane—the balance of the purchase price. He is bound as an officer of the court to act properly and equitably, and so he must be deemed to have acted on the basis that he had adopted the contract and agreed to pay the full amount due under it.

LORD WRIGHT, M.R. : This is an appeal from a judgment of EVE, J., on an originating summons taken out by the applicants, the Ocean Steamship Co., Ltd., under the Companies Act, 1929, s. 192 (5). The applicants are aggrieved by the decision of the liquidator to the effect that they were not entitled to the remedy which they claimed, in the facts of the case. In order to appreciate the position it is necessary to go back some years. The applicants had been in occupation of a 30-ton electric crane at Yorkhill Basin, Glasgow. They ceased to occupy the basin, and the Anchor Line took their place and entered into occupation of that berth, and it was necessary to determine what was to happen to the crane. There were negotiations for some time, to which I do not intend to refer, because I think they are not admissible, and the whole question turns on the true construction of a document which admittedly contains the terms of the contract. It is expressly accepted as such in an answer from the Anchor Line of Sept. 4, 1931. [His Lordship read the agreement.]

The Anchor Line Company went into liquidation and, a petition having been filed by the Union Bank of Scotland to wind it up, on May 1, 1935, the official receiver was appointed provisional liquidator. On May 11 the official receiver agreed to sell all the assets of the company, including expressly this very crane, for a lump sum. On May 30 an order to wind up the company was made, and thereafter the court confirmed the

agreement for sale, which was duly carried into effect within a few days. On June 14 the present liquidator was appointed. In these circumstances the claim which is made is that the liquidator, as representing the company, is liable for the dealing with the crane in the way which I have stated, and the question to be determined first of all, in order to ascertain the position, is whether, under the contract of May 1, the property in the crane did or did not pass to the Anchor Line Company. If it did, then the question will arise: what are the resulting rights and remedies available against the liquidator? I shall consider first the question of the effect of the agreement.

If one looks at the Sale of Goods Act, 1893, the material section, to my mind, is sect. 17, which states the general rule, that the property passes when it is intended to pass:

(1) Where there is a contract for the sale of specific or ascertained goods the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.

(2) For the purpose of ascertaining the intention of the parties regard shall be had to the terms of the contract, the conduct of the parties, and the circumstances of the case.

In sect. 18 there are certain specific rules which are to apply. But, as I understand this case, sect. 18 does not apply here, because, in my judgment, sect. 18 can only apply, according to its terms, "unless a different intention appears." That refers back to sect. 17, and, as I construe the contract, a different intention does appear. I find, in the contract read as a whole, a clear intention that the property shall not pass until the purchase is completed.

The transaction, as I understand it, was simply this. The crane, being on the berth occupied by the Anchor Line, was in their occupation. They wanted to use it in the course of their ordinary business. It was, I say, in their "occupation"; it was a chattel and not a fixture to the realty; but I use the word "occupation" for convenience, in the sense that they were possessing and using it. They wanted to possess and use it. They were not, however, prepared there and then to pay the price for the crane, namely, £4,000. They entered, therefore, into this agreement, which was to operate, according to its language, "in the meantime"—that is to say, to tide them over their immediate financial difficulties. They were not to pay the purchase price at the moment or in one sum, but it was to be paid by the arrangement which is specified: £350 per annum was to be paid for the first two years; £450 per annum for the second two years, and £400 per annum thereafter. Of those sums, I take it, £350 is the starting amount. The sum of £240, which was 6 per cent. on the purchase price of the crane, was to be regarded as depreciation. That I understand to mean this: the crane, being treated as the property of the Ocean Steamship Company, was year by

year depreciating, and, according to business practice, they would write off, on the footing that it was their property, a sum for depreciation year by year, and that would have appeared in their books as a debit. But that amount year by year was to be paid over to them, and paid in that way by the Anchor Line. The amount of the purchase price was to be reduced proportionately, just as the crane in question was being reduced year by year in value. That explains, I think, the provision as to the payment of depreciation.

On the other hand, the payment appropriated to interest was on a different footing. The word "interest" might seem to indicate that there was a debt for the whole purchase price or for the balance each year of the purchase price, the payment of which was foreborne at interest. If that were its meaning, then it would be rather consistent with the view that the debt of £4,000 was due and outstanding from beginning to end. But I do not so regard it. I think the word "interest" is used here somewhat loosely as indicating a payment year by year in the nature of rent, or for use and occupation of the crane. As that was paid on that footing, it was not to go in reduction of the £4,000, because the Anchor Line were getting value in return—namely, the use of the crane in the meantime.

There is a further provision which to my mind is only consistent with the view that the property in the crane was still vested in the sellers: that is the clause "In the meantime you"—that is the Anchor Line—"will have entire charge of and responsibility for the crane in every respect." I think that indicates that the Anchor Line did not become owners of the crane but were merely bailees, and, as bailees, were responsible for its safety and its preservation to the bailors, who were the owners—namely, the Ocean Company.

Finally, I attach very great importance to the language "completion of the purchase," read with the remaining words. The first clause states the agreement as one for "a deferred purchase price of £4,000." Now, a deferred purchase price might be construed as meaning a price for a deferred purchase, or a price for a purchase which was to become complete at once, though the payment of the price was deferred. In that state of ambiguity I attach importance, as solving the ambiguity, to the words immediately following: "Until the completion of the purchase," and to the similar words: "balance actually to be paid by you on completion of the purchase, whenever that may take place." I agree that these words are not conclusive, but, read in the context in which they are, they support the view which I otherwise arrive at: that what we have here is a contract, the intention of which is that there should be an agreement to purchase, but that that agreement should not be completed or carried out until some time, "whenever that may take place"—the time, it is implied in the contract, when the balance of the purchase

price is paid ; and then, and then only, the property in the crane is to vest in the Anchor Line. That certainly agrees with the business probabilities. It is always dangerous to rely on business probabilities in construing any contract, because it does not necessarily follow that the parties have contemplated all that might happen. I prefer, therefore, to rest my judgment on the construction which I attach to the terms of the contract, which, to my mind, show an intention within the meaning of sect. 17 as to the time at which the property is to be transferred.

That being so, it is necessary to consider what the position now is. What has to be determined is, what is the effect of the sale by the official receiver, dated May 11, 1935, and confirmed by the court two days afterwards, and eventually carried out by the official receiver ? In my opinion, having regard to the position occupied by the official receiver as an officer of the court, it must be assumed that the intention was to act in accordance with law. Under an agreement such as that in question the purchaser—if I may call him so ; the person who has agreed to purchase and who is in possession of the purchased chattels—may transfer, and has at least the physical possibility of transferring, those chattels to a purchaser. The official receiver, had, as I think, no right to do so until the purchase had been completed by the payment of the balance of the price ; but he had the physical means of doing so, of entering into the bargain with the new purchaser. If that is done, I think it must be assumed that in doing so the intention was to do what was right ; and what he did could only be regarded as what was right if it was done with the intention and with the effect of adopting the purchase by paying off the balance there and then when he sought to transfer the goods. The alternative course would be a claim for conversion, but the applicants are entitled to choose which alternative they prefer, and they have chosen the alternative of treating the case as one in which the official receiver has done what he might have done, namely, paid the balance of the purchase price in order to dispose of the chattel as part of the property of the company which he was selling *in toto* as a going concern. If he had done that, then he would have been liable to pay the balance of the purchase price, and that liability is in my opinion attached to him in law, in the facts of the case. That being so, the applicants are right in claiming, as against the company, the balance of the moneys which are due under the contract.

An analogous case, though it is not on precisely the same footing, is illustrated in *Cookney v. Dunbar* (1). That was a case where a person who had received goods on sale or return pledged them, and he was treated thereupon as having done an act adopting the transaction so that the property in the goods passed to him ; with the result that the original vendor could not recover from the person to whom they had been pledged, but the person in doing so had treated himself as a purchaser and was

liable to pay the price of the goods as if he had done any other act adopting the purchase. I think the same principle applies here, and I think, therefore, that the applicants are right in their claim for the balance of the purchase money against the liquidator.

ROMER, L.J. : I have come to the same conclusion, though I confess not without considerable hesitation. The Sale of Goods Act, 1893, s. 18, is drafted as follows :

Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer.

Rule 1.—Where there is an unconditional contract for the sale of specific goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment or the time of delivery, or both, be postponed.

It follows, in the view of the legislature, that where, under a contract for a sale of specific goods in a deliverable state, the time of payment or the time of delivery or both be postponed, the contract is not a conditional contract. It further follows that in such a contract, if the postponement of payment of the purchase price and the delivery of the goods can properly be described—as indeed in one sense they can properly be described—as a postponement of the completion of the purchase, the property will pass on the entering into the contract, although in that sense completion of the purchase be deferred. The question, therefore, which one has to consider is, in my opinion, whether on this contract a contrary intention does appear.

I agree entirely with LORD WRIGHT, M.R. that the word “interest” in this contract has not been used in its strict sense. That is obvious from this fact : that the same amount of interest—so-called—continues to be paid, although the principal sum on which the interest is being paid diminishes from time to time, and at the end of sixteen years has been reduced to about £160, if the contract has not been completed before that date. That being so, I have an uneasy feeling that the probability is that the parties used the word “depreciation” also in a loose way, and did not intend it to bear its strict usual meaning. On the other hand, the mere fact that the word “interest” is used in a loose way would not of itself justify the court in treating the word “depreciation” as being used in a loose way and as bearing other than its primary meaning, especially if the word as construed in its usual sense is intelligible in the contract. In this contract it is intelligible when used in its strict sense, for this reason. Assuming that the property did not pass to the purchasers on entering into the contract, and that, accordingly, the contract might not be completed and the property never pass, in the meantime the crane would

have been in the possession of the purchasers, and, when re-taken possession of by the vendors, would have suffered in value by reason of depreciation. In that case the vendors choose to re-take the crane and not to sue the purchasers. They would take back the crane and in the meantime they would have received from the purchasers a sum sufficient to make up the depreciated crane to the value that it had at the date of the contract. Now, if the word "depreciation" be used in its strict sense, then it points strongly to the fact that the parties did not intend the property to pass upon the execution of the contract, because it is inconceivable that purchasers in whom the property in the crane is vested should pay the vendors moneys in respect of the depreciation of the crane.

Some light is perhaps thrown upon the matter by a clause which at first sight I thought was rather against the appellants, but which I now think is at least neutral: it is clause (4) of the contract, which provides as follows:

In the meantime, you will have entire charge of and responsibility for the crane in every respect.

That does not in terms throw upon the purchasers, as I read the clause, any enforceable obligation to insure the crane or do anything else towards keeping the crane in repair. I was at first inclined to think that that was inconsistent with the view that the vendors were retaining the property in the crane. On the other hand, if the property had passed to the purchasers, one does not see why the clause should expressly refer to the fact that the responsibility for the crane was upon the purchasers. It would naturally be assumed that it was, if the property had passed to them. I come, therefore, to the conclusion that there is a contrary intention within the meaning of the section, and that the parties intended the property to pass only when the purchase was completed in the more strict sense of the term; that is to say, the time when not only the purchase money was paid, but the property at law in the goods passed to the purchaser. The property, therefore, remaining in the appellants and never having passed to the company that is now in liquidation, the position at the commencement of the liquidation was this: the appellants were the owners of the crane, who, of course, could have proved in the liquidation for any damage they might have sustained by reason of the failure of the company to fulfil the contract of purchase. The liquidator, of course, could not be compelled by them, he was under no obligation, to complete the purchase. On the other hand, it might be that the liquidator or official receiver desired to have possession of the crane for the purposes of his liquidation, and that object could be attained by the liquidator determining to carry out the contract, which, as I have already pointed out, he is under no obligation to do. In my

opinion, in the circumstances that have happened, it must be taken that the liquidator determined to carry out this contract, that is to say, to make use of the contract for the purposes of the liquidation, and, that being so, he must make the payment due to the vendors under the contract, in accordance with the principle of which one example, at any rate, is to be found in the case of *Re Levi & Co.* (2). For these reasons, I agree that this appeal succeeds.

GREENE, L.J.: I agree. The contract of Sept. 3, 1931, is not happily worded, but I am unable to read it as a contract for a purchase with the purchase price to be payable by instalments. The conception of a purchase price payable by instalments is a very familiar one, and the parties to this bargain would have had no difficulty in saying that this was what they meant, if it had been what they meant. In point of fact, the sums which are payable under the contract are split into two categories: one category is described as interest and the other as depreciation. Now, the use of the word "depreciation," to my mind, is the most significant thing about this document. It is impossible to treat these payments as being payments, in effect, of instalments of the purchase price, because, had that been the intention, the principal sum on which the interest was to be payable would have diminished year by year. Instead of that, the principal sum remains constant in spite of these yearly payments, and the true nature of them, as I read the contract, is described by the word "depreciation"—subject to this: that if the contract is completed by the payment of the purchase price, sums paid in respect of depreciation are to be taken into account and treated as part of the purchase price. In other words, those sums, when paid, are sums paid in respect of depreciation; but, as was a perfectly obvious, sensible and businesslike thing to do—in fact, the only thing to do—when the contract is finally completed, the purchaser is to be given credit for what he had paid.

Now, if the contract were not completed, those sums would remain in the character which they are expressed to have, namely, depreciation, and the effect would then be this: that the vendors, being entitled to take back the crane, would get into their possession a crane which had depreciated during the period in question and would have in their pockets the yearly sums paid in respect of depreciation; just as, if they had kept the crane themselves, they would have set aside every year out of their own money sums to provide for depreciation. I think myself that the key to the meaning of this contract is to be found in the use of that word and in the machinery of payment, which stands in strong contrast to the ordinary idea of the payment of a purchase price by instalments. It seems to me that it would be applying wrong principles of construction to give to such a word as the word "depreciation," and

to such machinery for payment as is found here, no sufficient weight.

On the other hand, it is said, and said with truth, that the same argument applies—and I think that to a certain extent it does apply—to the use of the word “interest.” The use of that word is, of course, more consistent with the idea of a sum for which the purchaser is to be liable, although payment is to be postponed. But it is to be observed that whichever view were taken of the question in this case, payment of some kind would fall to be made by the purchaser. If he was buying then and there and the property passed to him, payment only being postponed, it would be natural and businesslike that he should be asked to pay interest in the strict sense. On the other hand, if the property did not pass, he would have to make some payment for the benefit that he was receiving day by day from the use of this crane. The parties do use the word “interest,” but it seems to me that the use of the crane for payment of some kind, whatever name you give to it, was an essential part of the transaction; whereas “depreciation” stands out of this agreement as something very special and very particular, which is not capable of being reconciled with the idea of a purchase by instalments.

On the second part of the case: if the construction of the agreement is what I take it to be, the official receiver, when he was appointed, found himself in this position—and I think he must be deemed to know what his legal rights were in respect of this matter. He has a crane and he wishes to sell the entire business. He enters into a contract for selling the business, of which the crane is an important part, because it is specifically mentioned in the contract into which he entered, and he obtains the approval of the court to that contract. It seems to me quite impossible to impute to the official receiver any intention except the intention to confer upon his purchaser a good title to the assets which he was selling. The only way in which he could obtain a title to that crane was by paying the purchase money which was to be paid under the contract, less sums previously paid in respect of depreciation. That, according to the true construction of the contract in my opinion, he could have done at any moment; he could have perfected his title and so put himself in a position to confer a good title on the purchaser. That he can do to-day, if he pays.

I for one cannot treat this matter on the footing that the official receiver is to be regarded as putting himself in a position where he has not intended to give this purchaser a good title; and the only way, therefore, in which he could effectively carry out that intention and make use of this asset for the purpose of a beneficial sale of the company's undertaking was by taking to this contract and paying up any cash that fell to be paid up. The argument that the proper remedy of the present appellants, is to take proceedings against the purchasers

appears to me, with all respect, to be rather fantastic, because it would mean an action against the purchasers by the present appellants and then, presumably, an action by those purchasers against the official receiver or the liquidator because they had not a title to the goods which they had bought. In those circumstances it appears to me that the official receiver must be taken by his action to have manifested a clear intention to take to this contract and put himself in a position to give a good title to that crane, a thing which he could only do by payment in full of what remained to be paid. I agree with the order proposed.

Appeal allowed. Declaration made :

That the appellants are entitled to be paid out of the assets of the Anchor Line company the whole of the money payable under the said agreement as though the liquidator had completed the purchase on May 13, 1935.

Solicitors : *Sharpe, Pritchard & Co.*, agents for *Alsop, Stevens & Collins Robinson*, Liverpool (for the appellants) ; *Collyer-Bristow & Co.* (for the respondent).

[*Reported by* DEREK H. KITCHIN, ESQ., *Barrister-at-Law.*]

TOLLER v. LAW ACCIDENT INSURANCE SOCIETY, LTD.

[COURT OF APPEAL (Greene and Scott, L.JJ.), **June 22, 29, 1936.**]

Arbitration—Stay of legal proceedings—Insurance policy containing arbitration clause—Action on policy—Denial of existence of policy—Claim for arbitration—Repudiation.

A motorist, on Aug. 15, 1935, signed a proposal form for motor car insurance. The premium in respect of the insurance was not paid, and the policy was not issued, but cover notes were issued from time to time. On Oct. 2, 1935, after the expiration of the last cover note, the motorist was involved in an accident and incurred certain liabilities. The premium in respect of the insurance was paid on Oct. 29, 1935, and a policy dated as from that date was duly issued. The motorist issued a writ claiming, *inter alia*, a declaration that a binding contract of insurance existed between the insurance company and himself on Oct. 2, 1935. The insurance company applied for a stay of the action on the ground that the issue fell within the arbitration clause in the policy :—

HELD : since, if the issue were referred to arbitration, a finding by the arbitrator that there was no contract in existence as at the date of the accident, would be a finding that the arbitration clause never existed and that the arbitrator never had jurisdiction to deal with the matter, the issue was a proper one to be tried in the courts.

Observations on “repudiation” of contracts.

[**EDITORIAL NOTE.** The judgments herein carefully distinguish between the denial of the existence of a contract between parties where the contention is that no contract has ever existed between them and the similar denial where the contention is that the contract has come into existence but has been determined by the exercise

of some power of determination given by the contract itself. In the present case the contract which was to contain the arbitration clause was the policy itself and a contract to issue a policy would not contain an arbitration clause. Therefore until the policy was issued there would be no effective arbitration clause, though it might be averred that there was a contract to enter into the contract of insurance, *i.e.*, the policy.

AS TO CONDITIONS OF OBTAINING A STAY OF LEGAL PROCEEDINGS, see HALSBURY, Hailsham Edn., Vol. 1, pp. 638, 639, para. 1085; and FOR CASES, see DIGEST, Vol. 2, pp. 368-375, Nos. 353-394.]

Cases referred to :

- (1) *Stevens & Sons v. Timber & General Mutual Accident Insurance Assocn., Ltd.* (1933), 102 L.J.K.B. 337; Digest Supp.
- (2) *Golding v. London & Edinburgh Insurance Co., Ltd.* (1932), 43 Lloyd. L.R. 487.
- (3) *Jureidini v. National British & Irish Millers Insurance Co., Ltd.*, [1915] A.C. 499; 2 Digest 333, 146.
- (4) *Macaura v. Northern Assurance Co.*, [1925] A.C. 619; Digest Supp.
- (5) *Stebbing v. Liverpool & London & Globe Insurance Co., Ltd.*, [1917] 2 K.B. 433; 2 Digest 333, 147.
- (6) *Woodall v. Pearl Assurance Co.*, [1919] 1 K.B. 593; 29 Digest 403, 3187.

APPEAL by the plaintiff against an order made by HILBERY, J., in chambers ordering that the action be stayed and referred to arbitration.

The plaintiff, on Aug. 15, 1935, signed a proposal form for motor car insurance with the defendants. On Oct. 2, 1935, whilst driving his motor car the plaintiff was involved in an accident which resulted in damage to a taxi cab owned by one Atkins and to a pedestrian, one Fawkner. On or about Apr. 2, 1936, Atkins obtained judgment against the plaintiff in the Marylebone County Court for the sum of £2 15s. and £9 13s. 8d. costs. On Mar. 9, 1936, Fawkner obtained judgment against the plaintiff in the High Court for the sum of £100 damages and costs. The defendants prior to the date of the accident had issued to the plaintiff cover notes granting him indemnity for fourteen days from the date of the issue of such cover notes, and thereafter issued to him a policy of insurance. The last of the cover notes was dated Sept. 16, 1935, and granted indemnity to the plaintiff for fourteen days thereafter, namely, until Sept. 29, 1935, and the policy which was dated Nov. 16, 1935, granted him indemnity from Oct. 29, 1935, to Aug. 15, 1936. The cover granted by the cover notes was "in terms of the society's usual form of comprehensive policy," a term and condition of which was as follows :

All differences arising out of this policy shall be referred to the decision of an arbitrator to be appointed in writing by the parties in difference, or if they cannot agree upon a single arbitrator to the decision of two arbitrators, one to be appointed by each of the parties in writing or, in case the arbitrators do not agree, of an umpire appointed by the arbitrators in writing before entering upon the reference, and the making of the award shall be a condition precedent to any liability of the society or any right of action against the society in respect of any claim.

The plaintiff claimed that by reason of the above matters a contract of insurance existed between the plaintiff and the defendants as from Aug. 15, 1935. The defendants did not issue a certificate of insurance to the plaintiff until after the happening of the accident, and on Apr. 8, 1936, the plaintiff was convicted of the offence of unlawfully using a motor vehicle on Oct. 2, 1935, without there being in force in relation to such user of the vehicle a policy of insurance or such a security in respect of third party risks as complied with part II of the Road Traffic Act. The plaintiff issued a writ on May 8, 1936, against the defendants claiming a declaration that a binding contract of insurance existed between the plaintiff and the defendants on Oct. 2, 1935, and an order directing the defendants to issue to the plaintiff a full comprehensive policy in respect of the motor car valid for twelve months and dated Aug. 15, 1935. Further, the plaintiff claimed damages for breach of contract.

Upon the defendants' application, the master in chambers refused to make an order that all further proceedings in the action be stayed and referred to arbitration. Upon the defendants' appeal against the decision of the master, HILBERY, J., in chambers allowed the appeal and ordered the action to be stayed and referred to arbitration. The plaintiff thereupon appealed, moving to reverse the order of HILBERY, J., and that the action proceed to trial in the King's Bench Division of the High Court of Justice.

F. J. Tucker, K.C., and *G. R. King Anningson* for the appellant.

F. Soskice for the respondents.

Tucker, K.C. : There was a contract to insure and a binding contract of insurance on both parties at the date of the accident. The insurance company cannot claim the benefit of an arbitration clause in a policy which they themselves declare does not exist. If there is no policy, and an arbitrator were to give an award saying that there is no policy, that would be contrary to his jurisdiction.

Soskice : If the plaintiff is right in asserting that there was a contract, the mere fact of the denial of the existence of the contract is at best merely a repudiation by the defendant company which was not accepted by the plaintiff and therefore does not affect the rights of the parties, and leaves the arbitration clause intact. The effect of *Golding's* case (2) and *Stevens'* case (1) is that the conduct of the plaintiff must be regarded, and if he in his action sues under the policy and not for wrongful repudiation, he is thereby alleging the existence of the arbitration clause and accordingly bound by it.

GREENE, L.J. : This is an appeal from the decision of HILBERY, J., in which he ordered the action to be stayed and referred to arbitration, reversing the order of MASTER BAKER, who had refused to stay the action.

The facts are quite short and simple. The plaintiff, in Aug., 1935, had a current policy, in relation to a Lancia motor-car, issued by the defendants. That car, in the middle of August, he decided to sell, and he decided to purchase a Morris car in place of it. Now an arrangement was made between the plaintiff and the defendants, under which the plaintiff was to receive an allowance of, I think, £4 17s. off the price of the new policy. The plaintiff did not pay to the defendants the balance, and it is admitted that the defendants, the insurers, issued to him cover notes; and there were three of those. The first one lasted until the end of August; the second one was for fourteen days from Aug. 31, and the third one was issued on Sept. 16. After the expiration of the third cover note, namely, on Oct. 2, when there was no cover note applicable, an accident took place, involving the plaintiff in certain liabilities which it is not necessary to go into. The company, on Nov. 16, 1935, issued a policy dated as from Oct. 29, 1935, that apparently being the date when the plaintiff paid up the balance of the premium. If the company's only obligation was to issue a policy dated as beginning on Oct. 29, it follows that at the date of the accident they were not then liable to the plaintiff at all. On the other hand, the plaintiff complains that the defendant company had agreed to issue to him a policy which would have been in force on Oct. 2, when the accident took place and so entitle the plaintiff to claim under it.

The issue between the parties on that branch of the case is a perfectly simple one: the plaintiff alleging and the defendants denying the existence of a contract of insurance as on Oct. 2, with a consequential obligation on the part of the defendants to issue a proper policy in the usual terms. Looking for the moment at that issue and that alone, it is said by Mr. Soskice that that is a matter which can be properly referred to arbitration under an arbitration clause which the policy, if and when it was issued, would contain. Now, that clause is set out in para. 5 of the affidavit of Mr. Parsons sworn on this application on May 20, and it provides for the submission to arbitration of "All differences arising out of this policy." Now, the position being one in which the plaintiff is asserting and the defendants denying the existence of any contract of insurance at the relevant date, and in which the plaintiff is asserting and the defendants are denying the right of the plaintiff to receive a policy issued by the company retrospective to that date and before it, this result follows: if the defendants are right there is in existence with regard to the relevant period, no contract of insurance whatsoever. It is said, nevertheless, that the issue whether or not such a contract was or was not in existence falls within the arbitration clause. With the greatest respect to the very careful argument of Mr. Soskice, I am quite unable to accept that view. It appears to me that it can be put in this way: if the arbitrator (assuming it was referred to him) found

there was no contract in existence at all and no right to sue on the policy as at that date, he would be deciding that the very arbitration clause which founded his jurisdiction never existed and therefore he never could have had any jurisdiction to deal with that matter.

In my judgment the position is put as clearly as it can possibly be put by ROMER, L.J., in one of the cases cited by Mr. Soskice, of *Stevens & Sons v. Timber & General Mutual Accident Insurance Assocn., Ltd.* (1), at pp. 344, 345, where his Lordship says this :

A person who repudiates the contract *in toto* obviously cannot be allowed at the same time that he is repudiating it to avail himself of a clause contained in it. Where, therefore, a defendant who has so repudiated his contract applies to the court to refer to arbitration the question of the legality of such repudiation, his application must necessarily fail. For if the repudiation was justified the arbitration clause has gone. An arbitrator, therefore, who purported to award in favour of the defendant's repudiation would at the same time be making an award against the existence of his own jurisdiction.

Now, the class of case where the defendant insurance company is denying the existence of a contract is totally different from the class of case where the defendant, while admitting the existence of a contract, is relying on some clause in it to escape liability. It is very important in my view that language should be accurately used and there is great danger in the use of such words as "repudiation"; repudiation of a contract may mean that, having admittedly made a contract, you decide to break it and break it in such a way that you intend not to proceed with it. Another use of the word "repudiation" is where you say: "There never was a contract at all between us." If it turns out there was a contract, the act of one party denying the existence of it is to repudiate it; but supposing it turns out he was right and there never was a contract, then "repudiation" is used in a different sense from that in which it would be used when an existing contract is broken by a refusal to perform.

Now the cases which Mr. Soskice relied upon are the ones to which I have just referred, and the case of *Golding v. London & Edinburgh Insurance Co., Ltd.* (2), it is to be observed, is just the type of case to which I have been referring. It was a case in which the defendants were relying upon a provision in the policy to escape liability. The policy contained the usual clause which made the answers in the proposal form the basis of the contract and if the answers or any of them turned out to be untrue, it followed by the very terms of the contract itself that the defendants were entitled to say "We are not bound." That is exactly what the defendants were doing in that case; they were relying upon a term in the contract to excuse themselves from liability under it. That that was a proper matter for reference to arbitration under the arbitration clause I venture to think is apparent, because it was a question arising under the policy, whether or not the insurance company was entitled to say it was

not liable to pay the money which under the policy it had undertaken to pay. That case is a very long way from the present one, because in that case the insurance company had only repudiated the contract in this sense, and indeed I for myself do not quite see that the word "repudiation" in that case, with all respect to the *dictum* of SCRUTTON, L.J., is generally an apt one to use, because you do not repudiate a contract if you rely on a term in it which entitles you to escape liability under it. The effect is that you escape liability, but the use of the word "repudiation" in that connection is, I think, a dangerous one. It is perfectly true that SCRUTTON, L.J., in that case appeared to use the word "repudiation" in a rather different sense; he appears to have thought from the construction of the letters that the insurance company was taking up the attitude that the contract never was binding upon it. I am not quite satisfied that that is what SCRUTTON, L.J., meant but, whatever he meant in that passage by the word "repudiation," it is perfectly clear that GREER, L.J., based his decision on this at any rate, that the company was doing no more than relying on a term of the contract itself.

On the other part of the case the plaintiff is claiming under the policy which he says ought to be issued to him, and he claims in the alternative damages for breach of the contract for insurance. Now with regard to both those questions they of course logically arise at a later stage in the action. Logically the first question to be decided is, aye or no, was there a contract of insurance; was the plaintiff entitled to have an issue of a policy? When that question is answered in his favour, the rest of the action must proceed upon the basis that he has to receive the policy which he is entitled to and that that policy, if and when he receives it, must contain the usual clause (there is no dispute about this) that the making of an award under an arbitration clause must be a condition precedent to any liability of the society or any right of action against the society in respect of any claim. It may be when the plaintiff claims, if he ever gets so far with that part of his claim, it must be treated on the footing that that clause is enforceable against him; it may be the defendants will not be liable. I do not know; but however that may be, he must take his chance with regard to that, and that is a matter which can be dealt with. The defendants are entitled to rely upon it at the trial. I am not prepared to put the plaintiff on terms as to amending his claim; he must take the risk which can be dealt with at the trial. On the whole matter I think that the order of HILBERY, J., should be discharged, and that the appeal should be allowed.

SCOTT, L.J.: I agree with the whole of what GREENE, L.J., has said and only desire to add this: that the word "repudiation" is some-

what ambiguous. It may mean : repudiate the original existence of the contract. It may mean . disclose an intention to disregard it *in toto* and refuse to be bound by its terms altogether. Or it may mean : a mere contention that under the terms of the contract the defendant is completely free from liability by reason of some fact. Where the repudiation is to either No. 1 or No. 2, I think the principles upon which *Jureidini's* case (3) was decided entitled the plaintiff to say : " You cannot impose upon me an arbitration clause as a written submission in a contract which you either say never came into existence or have wholly repudiated." If the defendant relies on any term of the contract to escape liability, whether partial or total liability, then the arbitration clause applies. I do not think that *Jureidini's* case (3) goes any further than that. The cardinal sentence in that case is in the opinion of VISCOUNT HALDANE, L.C., where he says, at p. 505 :

Now, my Lords, speaking for myself, when there is a repudiation which goes to the substance of the whole contract I do not see how the person setting up that repudiation can be entitled to insist on a subordinate term of the contract still being enforced.

That is the arbitration clause. Having regard to the comments made on the clause in *Jureidini's* case (3) from time to time, it is well to remember the case of *Macaura v. Northern Assurance Co., Ltd.* (4), which came before LORD SUMNER (it was also an action on a policy of insurance), and what he said of *Jureidini's* case (3), at p. 631 :

The case of *Jureidini* (3) is not in point. There persons, who had repudiated the whole contract of insurance, afterwards relied on a limited arbitration clause contained in it, which required the amount payable to be determined by arbitration, and said that, until he had obtained such an award, the plaintiff could not complete his case. It was held that the defendants could not both repudiate the contract *in toto* and require the performance of a part of it, which only became performable when liability was admitted or established. The present case is the converse. Here an arbitration and award are conditions precedent to any action to enforce the policy. The defendants do not repudiate the policy or dispute its validity as a contract ; on the contrary, they rely on it and say that, according to its terms, express and implied, they are relieved from liability : see *Stebbing's* case (5) ; *Woodall v. Pearl Assurance Co.* (6).

If on the top of that passage from LORD SUMNER's opinion in *Macaura's* case (4) one adds the passage cited by my Lord from the judgment of ROMER, L.J., in *Stevens' case* (1), at p. 50, speaking for myself the law on the subject of these arbitration cases and the right of a plaintiff to have his action tried in the courts in a case where the whole contract is denied or repudiated, is quite clear. I agree entirely with what my Lord said otherwise.

Solicitors : *Saunders, Sobell, Greenbury & Co.* (for the appellant) ; *L. Bingham & Co.* (for the respondents).

[Reported by LESLIE CARNEGIE, Esq., Barrister-at-Law.]

ARRAM v. WALTERS.

[KING'S BENCH DIVISION (Horridge, J.), June 24, 1936.]

Metropolis—Employment agencies—Licensing—Carrying on business at licensed address—London County Council (General Powers) Act, 1921 (c.1), ss. 11-16.

The London County Council (General Powers) Act, 1921, provides for the licensing of employment agencies and requires that the business of the agency shall be carried on at the licensed address. The office of Collins Orchestras, Ltd., a theatrical employment agency, was in Dean Street. A contract between that firm and the defendant was drawn at the licensed premises on stationery headed with an address in Shaftesbury Avenue (an old office of the company) was discussed and developed at various places, and finally signed in an office of a director of the company in Lisle Street. By the contract the defendant agreed to pay commission "during the whole period of my present engagement and on every subsequent prolongation of the agreement." The defendant's present engagement with a music hall was determined and another band engaged for a week. After that the defendant was engaged again:—

HELD: (i) the real transaction took place at the licensed premises and the contract was not void as having been entered into at premises other than the licensed address.

(ii) the re-engagement of the defendant was a prolongation of the present engagement.

[EDITORIAL NOTE.] In this case the principle applied to moneylending transactions in *Kirkwood v. Gadd* (1) is applied to the similar provisions requiring licensing of employment agencies and the transactions of the business at the premises named in the licence.

FOR THE PRINCIPLE OF *Kirkwood v. Gadd* (1), see HALSBURY, 1st Edn., Vol. 21, Money and Moneylending, p. 48, note (q), and FOR CASES, see DIGEST, Vol. 35, pp. 207, 208, Nos. 324-341. FOR THE LONDON COUNTY COUNCIL (GENERAL POWERS) ACT, 1921, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 11, p. 1346.]

Cases referred to:

- (1) *Kirkwood v. Gadd*, [1910] A.C. 422; 35 Digest 207, 324.
- (2) *Anderson, Ltd. v. Daniel*, [1924] 1 K.B. 138; Digest Supp.

ACTION brought to recover commission payable in respect of the securing by an employment agency of a contract of employment. It was pleaded in defence that the contract was unenforceable as it had been executed at an address other than the licensed address of the agency contrary to the provisions of the London County Council (General Powers) Act, 1921, ss. 11-14. The material part of those provisions enact as follows:

11.—(1) It shall not be lawful for any person to carry on an employment agency without a licence from the licensing authority authorising him so to do.

(3) The licensing authority shall as soon as reasonably practicable after the receipt of an application under the provisions of this section grant or renew a

licence to the applicant to carry on an employment agency of the description and in the name and at the address specified in the application.

14. Every person who—(1) Carries on an employment agency without a licence under this part of this Act or otherwise than in accordance with the terms and conditions of such licence or obtains a licence or the renewal of a licence by wilful misrepresentation or by wilfully omitting to give such particulars as are required by this part of this Act to be given. . . .

The following agreement was entered into between Collins Orchestras, Ltd. and the defendant :

In consideration of your having procured for me and my band the engagements with Sir Oswald Stoll for the Shepherd's Bush Empire and the Alhambra, Ltd., which I have agreed to accept, I agree to pay you the commission of £6 per week of my total salary of £90. I agree to pay you this commission during the whole period of my present engagement of five weeks and on every subsequent prolongation of the agreement. In the event of my obtaining an increase in salary, I agree to pay you the full 10 per cent. commission on the salary I receive. I agree to pay this commission should I be transferred to any other theatre belonging to the Stoll Tour or any associated theatres.

This agreement was signed by the defendant. It was drawn up on stationery of Collins Orchestras, Ltd., which was headed with the address, 128-132 Shaftesbury Avenue. This address was in fact an old address of the company and was not the address contained in the licence granted them by the London County Council to carry on an employment agency. The negotiations, however, had begun at the licensed address, which was in Dean Street. They were continued at various places and the agreement was finally signed at the office of David Arram, a director of Collins Orchestras, Ltd. The agreement was afterwards duly assigned to the plaintiff. Under this contract the defendant's band was playing at the Chiswick Empire, a theatre belonging to the Stoll Tour, from Sept. 17, 1934, to Feb. 27, 1935. In pursuance of an agreement reached on Feb. 27 he recommenced playing there on Mar. 4, another band having been engaged for the intervening week. As from the latter date, Mar. 4, the salary received by the defendant was £6 less per week than previously, the arrangement being that, as the defendant would be exempt from paying £6 commission to the plaintiff by reason of the break, he should receive a salary less by that amount.

Cartwright Sharp, K.C. and *Keith Groves* for the plaintiff : The further engagement from Mar. 4 onwards was a "prolongation" of the original agreement upon a proper construction thereof. The break was a mere colourable device. The agreement was not void as being made at other than the licensed premises as all that was done elsewhere was purely incidental. The principle of *Kirkwood v. Gadd* (1) applies as the provisions of the London County Council (General Powers) Act, 1921, ss. 11-14, are similar to the Moneylenders Act, 1900, s. 2.

C. J. A. Doughty, for the defendant : The further engagement was not a prolongation of the original agreement but an entirely new agreement.

The agreement was in any event void because it was not entered into at the licensed address. All that took place there was purely preliminary to the real contract. The irregularity under the Act only incurs penalties but the irregular contract is void (*Anderson, Ltd. v. Daniel* (2)).

HORRIDGE, J. : In this case my judgment must be for the plaintiff. It is not disputed that the present plaintiff is the assignee of Collins Orchestras, Ltd., under a contract of Mar. 19, 1934. [His Lordship read the contract as set out above.] In that agreement Collins Orchestras, Ltd., were particular to state that if there ~~was~~ an alteration in price they should get the 10 per cent. on the increased payment, but there is no stipulation in it that if less was paid they should take less. I read that in this way, that if the defendant was employed by Stoll's in any of their theatres during five weeks or any prolongation of the five weeks engagement he would pay £6 a week. There is no dispute that until Feb., 1935, the defendant was employed by Stoll's and that such employment was a prolongation of the original engagement, but in February the Chiswick Empire, which was owned by Stoll's, wanted to pay less, and, as appears from the correspondence, they arranged with the defendant that if he could get out of paying £6 a week to the plaintiff, they would pay him a sum which would represent as much to him as he was receiving, less the £6 he was paying to the plaintiff. In order to carry that out, they put in another band for a week and at the end of the week took back the defendant's band at the lower wage. As I have said, there is no provision that the plaintiff should take less if the defendant did not receive as much. Therefore, it seems to me that was, and I find as a fact that it was, a prolongation of the engagement which had been obtained by the Collins Agency at the Chiswick Theatre from Stoll's and that it was a mere subterfuge to get rid of the plaintiff's £6 a week, and the plaintiff is entitled to be paid his £6 a week.

A further point is taken that at the moment when this agreement was signed at Lisle Street, there was not a licence in respect of Lisle Street. The facts were that up to Feb. 9, the licence had been in respect of Shaftesbury Avenue. From Feb. 9 to May 11, the licence from the council was in respect of Dean Street and Dean Street is the place where the whole beginning of this agreement started. In order to get an engagement, if he possibly could, for his band, the defendant came to Collins Orchestras, Ltd., at their address in Dean Street. It is quite true he did not limit his instructions to Stoll's, but out of that agreement Stoll's engagement fructified, and, although it was discussed at the Princes over beer, and at various places, it happened that it was actually signed at Lisle Street. In my view that does not mean that the plaintiff was not carrying on business at Dean Street. I think it was an incident of

the transaction that happened to take place at Lisle Street, but that the real transaction had been initiated and carried out at Dean Street in respect of which Collins Orchestras, Ltd., were licensed. There must be judgment for the plaintiff for £360 and costs.

Solicitors: *Arram, Fairfield & Co.* (for the plaintiffs); *Hall, Brydon & Chapman* (for the defendants).

[Reported by GERALD ABRAHAMS, ESQ., Barrister-at-Law]

Re JOEL, JOHNSON v. JOEL.

[CHANCERY DIVISION (Farwell, J.), **June 26, 1936.**]

Settlements—Tenant for life and remainderman—Dividends—Paid out of past profits—Year to which dividends attributable—Call on shares—Satisfied out of dividends—Capital or income.

Subject to certain bequests and dispositions, a testator who died in May, 1931, by his will gave the residue of his estate to his trustees for conversion and investment and directed that the investments representing such residue should be held upon trust as to certain parts for his children therein named, such parts to be settled upon certain trusts. The testator's residuary estate consisted *inter alia* of £100 preference shares and £100 ordinary shares in B. B., Ltd. By the articles of B. B., Ltd., it was provided that "the profits of the company which it shall from time to time be determined to divide in respect of any year or other period shall be applied first in paying the fixed cumulative preference dividend on the capital paid up on the preference shares to the close of such year or other period and subject thereto in paying a dividend for such year or other period on the capital paid up on the ordinary shares." At the date of the testator's death £1 per share had been paid up on the ordinary shares, but nothing on the preference shares. No dividend had been declared before Mar., 1931. By legislation in the Union of South Africa, B. B., Ltd., would become liable, in the event of its not distributing in each year dividends amounting to 75 per cent. of its profits in the Union, to a special super-tax. By an arrangement with the inland revenue, B. B., Ltd., which owed a large sum in respect of income tax, super-tax and sur-tax, was not to make any distribution by way of dividend until such sum should be discharged. In 1932 an interim dividend was declared on the ordinary shares "out of the profits of the company for the year 1931." In 1933 an interim dividend was declared which was to be paid "first out of the accumulated profits of the year to Dec. 31, 1924, and if these should not suffice then recourse to be had to the profits of the year to Dec. 31, 1925." Interim dividends were declared in 1934, and 1935, payable similarly out of undistributed profits for the years 1925, 1926 and 1927. When these dividends were declared calls were made upon the ordinary shares which were satisfied out of the dividends declared. A summons was taken out to determine whether the dividends were income or capital of the testator's residuary estate or fell to be apportioned between income and capital, and if so on what basis:—

HELD: (i) the interim dividends were dividends for the years in which they were respectively declared.

(ii) upon the evidence the intention of the company was a distribution of profits and not the capitalisation of the amount of the dividends and the dividends declared after the testator's death must be treated as income.

[EDITORIAL NOTE.] The question of capitalisation of profits of a company was very fully considered recently in the judgment of the Privy Council in *Commissioner of Income Tax, Bengal v. Mercantile Bank of India, Ltd.*, [1936] 2 All E.R. 857. The reasons of individual shareholders, even though they are in complete control of the company, do not show the company's intention; but here the arrangements were made entirely for the purposes of the company. It was the company which would be subject to the South African taxation and it was therefore for the benefit of the company that the arrangements were made.

AS TO CAPITALISATION OF PROFITS, see HALSBURY, *Hailsham Edn.*, Vol. 17, pp. 252-254, paras. 511-517, and FOR CASES, see DIGEST, Vol. 28, pp. 106-109, Nos. 657-670.]

Cases referred to :—

- (1) *Re Wakley, Wakley v. Vachell*, [1920] 2 Ch. 205; 9 Digest 598, 3994.
- (2) *Bouch v. Sproule* (1887), 12 App. Cas. 385; 9 Digest 596, 3984.
- (3) *Re Jowitt, Jowitt v. Keeling*, [1922] 2 Ch. 442; 9 Digest 593, 3966.

ADJOURNED SUMMONS to determine questions arising out of the administration of his estate under the will of Solomon Barnato Joel deceased. The testator at the time of his death was a director and, with his brother, sole shareholder in a company known as Barnato Bros., Ltd. By his will, dated Oct. 22, 1930, he appointed his brother Jack Barnato Joel, his son Dudley Jack Barnato Joel, and one F. L. Johnson to be his executors and trustees and, after making certain bequests and dispositions, not material to the present question, he gave the residue of his estate to his trustees for conversion and investment, and directed that the investments representing such residue should be held subject to the payment of his debts, funeral and testamentary expenses, legacies and annuities, and any duties on any legacy or annuity bequeathed free of duty, on the following trusts :

(a) Upon trust to pay one moiety of the income thereof to my wife during her life and subject thereto :

(b) Upon trust as to both capital and income as to two equal fifth parts thereof for my said son Stanhope Henry Joel as to another two equal fifth parts thereof for my said son Dudley Jack Barnato Joel and as to the remaining one equal fifth part thereof for my daughter Eileen Daphne Solna Joel.

The testator directed that the shares of his residuary trust fund given to each of his said children should be settled upon trust for the child for life (his daughter being restrained from anticipation) and after the death of the child subject to a power of the child to appoint a life interest in favour of any wife or any husband who might survive him or her on trust for the children or remoter issue of the child as therein mentioned and in the event of there being no issue upon such trusts as the child

should appoint and subject thereto upon trust that such child's share should accrue to the shares of the other children.

By clause 19 of his will the testator authorised his trustees, subject to the provisions thereinbefore contained to determine (*inter alia*) whether any moneys were to be considered as capital or income and whether any expenses, outgoings, or other payments ought to be paid out of capital or income and declared that every such determination, whether upon a question actually raised or implied in the acts or proceedings of the trustees should be conclusive or binding on all persons entitled under his said will.

The testator died on May, 22, 1931, and his will was proved on July 16, 1931. The testator was survived by his wife, his two sons and his daughter, who, on Nov. 18, 1931, became the wife of Frank Leslie John Rogerson. The testator's son, S. H. Joel, had three children, and Mrs. Rogerson one child, all of whom were infants at the date of the summons herein. The testator's son, Dudley Joel was not married.

The company, Barnato Bros., Ltd., in which the testator and his brother J. B. Joel were the sole shareholders, was incorporated on Nov. 11, 1919, with a capital of £5,000,000 divided into 20,000 preference shares of £100 each and 30,000 ordinary shares of £100 each. At the date of the testator's death a sum of £1 per share had been paid up on the said ordinary shares, but nothing had been paid up on the said preference shares. By art. 127 of the articles of association of the company it was provided as follows :

Subject as aforesaid the profits of the company which it shall from time to time be determined to divide in respect of any year or other period shall be applied first in paying the fixed cumulative preferential dividend on the capital paid up on the preference shares to the close of such year or other period and subject thereto in paying a dividend for such year or other period on the capital paid up on the ordinary shares.

But although in the year ending Dec. 31, 1924, and in all subsequent years the company made substantial profits no dividend was ever declared on the preference shares of the company, nor, until 1931, on its ordinary shares. In 1931, and in the following years a dividend was declared on the ordinary shares of the company, as follows :

(1) On Mar. 30, 1931, which was stated to be paid out of the profits of the years 1930, 1929, 1928 and 1927 in that order.

(2) On Mar. 31, 1932, which was stated to be paid out of the profits of the company for 1931.

(3) On June 21, 1933, which was stated to be paid and satisfied first out of the accumulated profits of the year to Dec. 31, 1924, and, if those should not suffice then recourse should be had to the profits of the year to Dec. 21, 1925.

(4) On June 25, 1934, which was stated to be paid and satisfied first out

of the undistributed balance of the profits for the year to Dec. 31, 1925, and, if that did not suffice, that recourse should be had first to the undistributed profits of the year to Dec. 31, 1926, and then of the year to Dec. 31, 1927.

(5) On June 17, 1935, which was stated to be payable first out of undistributed balance of profits of the year to Dec. 31, 1926, and then out of the undistributed profits of the year to Dec. 31, 1927.

Apart from the dividend declared on Mar. 30, 1931, which was paid before the testator's death and in respect of which no question arose on this summons, all the above-mentioned dividends were used in payment of calls made on the shares in the company, the reasons which led to the calls being made and the dividends being declared in the manner above indicated being the necessity of meeting liabilities for arrears of taxation, in respect of which an arrangement was arrived at between the testator's brother and others and the inland revenue, and for the purpose of avoiding the incidence of further taxation under South African legislation to which the company was subject. The details of the arrangement made with the inland revenue and of the South African legislation appear in his Lordship's judgment.

The questions raised for determination by the present summons were whether the dividends on the said shares in Barnato Bros., Ltd., held by the trustees of the testator's will declared by the resolutions of 1932, 1933, 1934 and 1935 as above set out were income or capital of the testator's residuary estate or fell to be apportioned between income and capital and if so on what basis.

A. Andrewes-Uthwatt, for the plaintiffs, two of the executors and trustees of the will, stated the facts.

E. Milner Holland, for the first, third and fourth defendants, the testator's children: These dividends do not fall to be apportioned under the Apportionment Act, 1870, s. 2. None of them is expressed by the resolutions declaring them to be payable in respect of any period, and if there is no such period the Act cannot apply. The direction that they are to be paid out of the profits of a particular period is merely appointing a particular fund out of which they are to be paid; see *Re Wakley*, *Wakley v. Vachell* (1) and *Re Jowitt*, *Jowitt v. Keeling* (3). They must therefore be paid to the persons who, at the date of their declaration, were entitled to income.

The only other question is whether the making of the four calls changes the character of the dividends from income into capital. That is a question which always turns on the intention of the company, and on the evidence it is quite clear that the company declared these dividends in respect of these years in order to avoid the local taxation in South Africa, which could be achieved only on the footing that the dividends were distributed as dividends. As it was essential to distribute a dividend

in order to achieve the purpose which it is known was the object of the company, the company must have intended to distribute dividends, although it made calls which could and did in fact absorb the dividends, and not to do anything which would have amounted to capitalisation, since that would have defeated the whole intention of declaring dividends.

Wilfrid M. Hunt, for the second defendant, the testator's widow, adopted *Holland's* argument. I rely also on BUCKLEY on the COMPANIES ACTS, 11th Edn., p. 753, which puts into a clear form the result of *Re Wakley* (1). The operation of the Apportionment Act, 1870 depends not upon when the profits in question were earned, but when the company declares its dividends, and dividend *prima facie* is payable to the person entitled to the income at the moment of payment. Here the company, whose financial year ran from Jan. 1 to Dec. 31, had no power to declare a dividend except for the last preceding year with which it was dealing in its accounts.

L. W. Byrne, for the remaining defendants, the children of the testator's children: These payments are payments within the Apportionment Act, 1870. Art. 127 contemplates that the company must divide its profits in respect of a year or other period. It is not, therefore, necessary to find something on the face of any resolution saying in respect of what period the profits are divided, and, in the absence of anything to say what the period is, it must be the period during which the dividends were earned. If that is not so there is no way of identifying the year or period as required by art. 127. The circumstances in *Re Wakley* (1) were rather peculiar because that was a case of arrears of preferential dividends, and all that was done there was to state that those dividends would, in fact, be distributed out of the dividends declared and paid.

On the question of the real effect of the company making calls contemporaneous or nearly contemporaneous with the declaration of dividends, the power of the company, by virtue of the lien which it had to retain dividends should be taken into consideration. That points to an inference that the company's intention must have been to pay dividends in such a way as to retain them as capital.

FARWELL, J.: Apart from the arrangement with the inland revenue the company could have paid dividends and at the same time have said it was making a call on the shareholders. Is the mere coincidence that a dividend is declared and a call is made contemporaneously for an amount which corresponds to the amount of the dividend, enough to enable the court to say that the company intended to capitalise?

L. W. Byrne: Taken with the other circumstances of the case it is.

FARWELL, J.: The question that I have to determine on this sum-

mons is one of some interest and of considerable importance to the parties concerned, because very large sums of money are involved. The question arises, to some extent, under the testamentary dispositions made by Mr. Solomon Barnato Joel in his will, and, to some extent, from certain resolutions passed by a company of Barnato Bros., Ltd., in which the testator had a very large interest.

The testator died on May 22, 1931, having made his will on Oct. 22, 1930. It is not necessary for me to refer in any detail to that will. The testator appointed his brother, Mr. J. B. Joel, one of the plaintiffs herein, and two other persons, to be his executors and trustees. He gave a large number of legacies to which I need not refer, and he devised and bequeathed certain other properties, to which, again, I need not refer. Then in clause 11 of his will he devised and bequeathed all his real and personal estate not otherwise disposed of to his trustees upon trust to sell, call in and convert into money all such parts of the same as should not consist of money or investments of the nature authorised by his will, and by clause 12 he directed his trustees out of the clear moneys to arise from such sale calling in and conversion as aforesaid and out of his ready money and such investments as aforesaid to pay or provide for his debts, funeral and testamentary expenses and the legacies and annuities bequeathed by him and any duties payable on any legacy or annuity bequeathed free of duty, and subject thereto he directed his trustees to hold the residuary trust fund upon trust to pay one moiety of the income to his wife during her life, and, subject to that payment, upon trust as to both capital and income as to two equal fifth parts to his son Stanhope Henry Joel, as to another two equal fifth parts thereof for his son Dudley Joel and as to the remaining one equal fifth part for his daughter Eileen Daphne Solna Rogerson. Then he proceeded to settle the shares of his children and it is the fact that the shares of the children are settled which to some extent raises the question which I have to determine. There is nothing else in the will to which I need refer beyond saying this, that in clause 19 the testator has given his trustees very wide powers indeed to determine all questions of doubt or difficulty that may arise in the administration of his estate and in dealing with his property, but the trustees in this case, and very properly, are not willing to undertake the responsibility of deciding the present question under that power, having regard to the very large sums of money which are involved.

The testator was, as I have said, very largely interested in a company known as Barnato Bros., Ltd. That company was incorporated on Nov. 11, 1919, under the Companies Acts, 1908 to 1917, with a capital of £5,000,000. The testator and his brother, Mr. J. B. Joel were at all times the sole shareholders in the company each of them holding 10,000 preference shares of £100 each and 15,000 ordinary shares of £100 each.

At the death of the testator a sum of £1 per share (making £30,000 in all) had been paid up on the ordinary shares, such sum having been paid up on Mar. 30, 1931, and nothing had been paid up on the preference shares.

Under the articles of association of the company there were certain provisions to which I must refer. Art. 19 provides :

The directors may from time to time make such calls as they think fit upon the members in respect of all moneys unpaid on the shares held by them respectively and not by the conditions of allotment thereof made payable at fixed times.

Art. 30 gives the company a first and paramount lien upon the shares for any indebtedness of the member in whose name they are registered, including unpaid calls. From that I think I can pass to art. 127, which is an article of some importance in this matter. Art. 127 provides as follows :

Subject as aforesaid, the profits of the company which it shall from time to time be determined to divide in respect of any year or other period shall be applied, first in paying the fixed cumulative preferential dividend on the capital paid up on the preference shares to the close of such year or other period—

pausing there for a moment, as I have said, nothing has been paid on the preference shares, and therefore no question arises as to dividend on the preference shares. Then the article proceeds :

and subject thereto in paying a dividend for such year or other period on the capital paid up on the ordinary shares.

Art. 131 provides :

No dividend shall be payable except out of the profits arising from the business of the company, and no dividend shall carry interest as against the company. The declaration of the directors as to the amount of the profits of the company shall be conclusive.

Art. 132 provides :

The directors may from time to time pay to the members such interim dividend as in their judgment the position of the company justifies.

And Art. 133 provides :

The directors may retain dividends payable on any shares on which the company has a lien and may apply the same in or towards satisfaction of the debts, liabilities and engagements in respect of which the lien exists.

I think these are all the articles to which I need call attention.

As I have said the testator died on May 22, 1931, a date which it is necessary to bear in mind, and no dividend on the ordinary shares had been declared until the year 1931. During the whole of the period from the incorporation of the company down to that date no dividend was declared at all, but on Mar. 30, 1931, an interim dividend, which was paid in cash, was declared of £4 5s. 0d. per share free of tax, to be paid

out of the profits of the years 1930, 1929, 1928, and 1927 in that order. No question arises with regard to that dividend because it was declared prior to the death of the testator.

In the following year on Mar. 31, 1932, a further dividend was declared and the resolution was in this form :

An interim dividend of £4 per share free of tax be paid on Mar. 31, 1932, to the members holding ordinary shares on that day out of the profits of the company for the year 1931.

And in the following year on June 21, 1933, a dividend was again declared, it being resolved :

A dividend of £4 10s. per share free of income tax on the 30,000 ordinary shares of the company be paid and that such dividend be paid and satisfied first out of the accumulated profits of the year to Dec. 31, 1924, and if these should not suffice then recourse to be had to the profits of the year to Dec. 31, 1925.

On June 25, 1934, it was resolved :

To pay a dividend of £5 per share free of income tax on the 30,000 ordinary shares of the company such dividend to be paid and satisfied first out of the undistributed balance of the profits for the year to Dec. 31, 1925, and if this should not suffice, then recourse to be had to first the undistributed profits of the year to Dec. 31, 1926, and if this should not suffice then recourse to be had to the undistributed profits of the year to Dec. 31, 1927.

And finally on June 17, 1935, a similar resolution was passed for a dividend of £3 per share :

such dividend to be paid and satisfied first out of the undistributed balance of profits of the year to Dec. 31, 1926, and if this should not suffice then recourse to be had to the undistributed profits of the year to Dec. 31, 1927.

As I have already said £1 each had been paid on the ordinary shares and no further payments had been made. But in the year 1932 the company resolved to make a call on the shares, and by a resolution dated Mar. 31, 1932, a call was made of £66 10s. 0d. per share. The total amount due in respect of such call, which was £1,995,000 was satisfied as to £120,000 by the dividend declared as aforesaid and as to the rest of it in other ways. Similar resolutions were passed on June 21, 1933, for a call of £4 10s. 0d. per share, on June 25, 1934, for a call of £5 per share, and on June 25, 1935, for a call of £3 per share. These calls were in fact satisfied out of the amounts of the dividend which had been declared in these years, with the result that a total sum of £80 has now been paid up on these shares.

The evidence shows that the reasons which led to the aforesaid calls being made, and the aforesaid dividends being declared in the manner aforesaid, was the necessity of meeting liabilities for arrears of taxation and avoiding the incidence of further taxation. The position which such transactions were designed to meet was this. At the date of the testator's

death there was due from the company, the firm of Barnato Bros., (a firm of which the testator and Mr. J. B. Joel were the sole partners) and the testator and Mr. J. B. Joel personally a very large sum in respect of income tax, super-tax and sur-tax. Shortly after the death of the testator it became necessary to make some arrangement with the inland revenue for the payment of that sum, and an agreement was arrived at under which it was arranged that the sum so due should be discharged by instalments over a period of three years, but upon the terms that, until the same was discharged, there should be no drawings from the said firm of Barnato Bros., no distribution to the beneficiaries under the testator's will and no distribution by the company by way of dividends. The profits of the company for the calendar years 1924 to 1927 inclusive were assessed to super-tax under the Finance Act, 1922, s. 21, but as regards the profits of the company for the years 1928 to 1931 inclusive, the inland revenue, after considering the circumstances of the company, decided that no such assessment should be made, and by letter dated May 24, 1934, the inland revenue informed the company that no assessment would be made under sect. 21 for the calendar years 1932 and 1933, and the company expects that a similar decision will be reached in respect of the calendar year 1934.

Under recent legislation in the Union of South Africa (within the words of which the company, which owned a large number of securities in the Union fell), the company would, in the event of its not distributing in each year dividends amounting to 75 per cent. of its profits in the Union, have become subject to a special super-tax. In order to avoid the South African taxation it was accordingly necessary to declare dividends in the years 1932 to 1935 inclusive. In these circumstances, these dividends having been declared, and these calls having been made, the question I have to determine is as to the rights between capital and income of the dividends so declared, and it is put in this way :

To have it determined whether the dividends on the shares in Barnato Bros., Ltd., held by the trustees of the testator's said will, declared by resolutions dated Mar. 31, 1932, June 21, 1933, June 25, 1934, and June 17, 1935, are income or capital of the testator's residuary estate or fall to be apportioned between income and capital and if so on what basis.

The question as to rights as between capital and income and dividends has been considered and decided in the case of *Re Wakley, Wakley v. Vachell* (1), a decision of the Court of Appeal, to which one is always obliged to refer if one desires to ascertain what the rights of the parties are in a case of this kind. In *Re Wakley* (1) the testator specifically bequeathed certain cumulative preference shares in a company to his son and he settled his residuary estate upon trust for all his children. At his death in 1905 the dividends of these shares were in arrear and it

was only in 1907 that there were any profits available for dividend. In that year an interim dividend was declared sufficient in amount to satisfy all the arrears upon the preference shares. The resolution, at which it is necessary to look, and which is on p. 209 of the report, was in these terms :

On Dec. 2, 1907, the directors resolved to declare, and forthwith pay, an interim dividend at the rate of 18 per cent. on the preferred, and 24 per cent. on the deferred shares, "which payment will cover the cumulative dividend on the preferred for three years ending June, 1907, and on the deferred for two years ending 1906."

The question arose as to whether the dividends so declared must be treated as capital or income, or whether they must be apportioned, and the Court of Appeal decided that the dividend declared in 1907 must be treated as being in respect of that year only and that the Apportionment Act did not apply, and consequently that the whole of the dividend belonged to the testator's son, the testator having died in 1905. It is not necessary for me to refer to the whole of the judgment in this case and I propose only to refer to one or two passages. LORD STERNDALE, M.R., in his judgment refers to the Apportionment Act, 1870, ss. 2 and 5. Sect. 2 provides :

All rents, annuities, dividends, and other periodical payments in the nature of income (whether reserved or made payable under an instrument in writing or otherwise) shall, like interest on money lent, be considered as accruing from day to day, and shall be apportionable in respect of time accordingly.

And sect. 5 provides that :

the word "dividends" includes (besides dividends strictly so called) all payments made by the name of dividend, bonus, or otherwise out of the revenue of trading or other public companies, divisible between all or any of the members of such respective companies, whether such payments shall be usually made or declared at any fixed times or otherwise ; and all such divisible revenue shall, for the purposes of this Act, be deemed to have accrued by equal daily increment during and within the period for or in respect of which the payment of the same revenue shall be declared or expressed to be made.

Then the learned judge proceeds at p. 216 :

I agree with PETERSON, J., that under these sections the important matter to be considered is not the period in which the divisible revenue may be earned, but the period in or for which the payment of such divisible revenue shall be declared or expressed to be made. It is however admitted that such declaration must be made in accordance with the powers conferred upon the directors, and that a declaration that the dividend was paid in respect of a period by which in law it could not be paid would be of no effect.

I do not know that there is anything else to which I need refer in this judgment because I think the result of the decision is adequately summed up in a very few words in BUCKLEY on the COMPANIES ACTS, 11th Edn., p. 753, where the learned author says :

The enquiry as to the time when the profits were earned by the company is immaterial as between tenant for life and remainderman. Their rights are

determined by the time not at which the profits are earned by the company, but at which they are by the action of the company made divisible among the members.

One has therefore to look at the resolution which in this case the company passed and under which the dividends were made payable, in order to see what is the period for which they were paid. When one looks again at the articles of the company one sees that in art. 127 the profits of the company, apart from the dividends on the preference shares, shall be applied in paying a dividend for such year or other period on the capital paid up on the ordinary shares, and I am invited to say that, when this company passed the resolution on Mar. 31, 1932, to pay an interim dividend of 4 per cent. free of tax to the members holding ordinary shares on that day out of the profits of the company for the year 1931, and, on subsequent occasions, resolved that dividends should be paid, such dividends to be paid and satisfied first out of the accumulated profits of the various years, that the material dates in this case, having regard to the form of art. 127, must be the years out of the profits of which these payments are to be made. In my judgment that is not the construction which ought to be put upon these resolutions. Taking the first one, the interim dividend there referred to is, in my judgment, clearly an interim dividend for the year from Jan. 1, 1932, to Dec. 31, 1932, which was the financial year of this company, and the fact that the source from which the money was to be taken, in order to make the payment, is set out in the resolution is not in my judgment a declaration of the period for which the payment is being made. It is true that it is not in terms said that the interim dividend is for the current year, but, reading the resolution as a whole, in my judgment it is reasonably plain that it is a declaration of dividend for the current year, with a decision as to the particular source from which the money is to be made available, and, if that be the true construction of the first resolution, that is to say, the resolution of Mar. 31, 1932, it seems to be that I must put the same construction upon the following resolutions. There is a resolution, in my judgment, to pay the dividend in the current year in each case with the added resolution as to the moneys which are to be available for the sum to be so paid. If that be the true construction of these resolutions it necessarily follows that the Apportionment Act, 1870, can have no application, because, so far as the first of these dividends, that is the one of Mar. 31, 1931, is concerned, the whole of that dividend would belong to the testator who was then alive. With regard to the remaining dividends, the whole of these dividends are for purposes after the death of the testator, and accordingly they must be treated as being dividends for the years subsequent to his death. If that is so, there can be no question of apportionment, and, subject to the next question which I have now to consider, they must be treated as profits and income for the years in question.

But then, it is said, even if that be the true view in this particular case, these dividends cannot be treated as income for the purposes of considering the rights of the tenant for life and the remaindermen under the testator's will, because simultaneously, or almost simultaneously, with the resolutions to pay these dividends there was a resolution to make calls on the shares for amounts which were more or less the same as the amount of the dividends, and, it is said, it is from that that the court must assume that the intention of the company was not to make a distribution of profits among the members of the company, but to capitalise the dividends payable under the resolutions, by preventing them going to the shareholders and retaining them for the purposes of satisfying the calls which had been made upon them in that way. The articles of association of the company lend some colour to that argument, and I think it may very well be that if one finds a case where a company is declaring dividends and, at the same time, is resolving to make calls on unpaid shares, and especially where the amount of the dividend corresponds to the amount of the call, in the ordinary case it would be very easy to assume that there was an intention on the part of the company to capitalise, and that it was never intended that the shareholders should receive in cash the dividends declared, but that these, being retained to answer calls, should thus become part of the capital of the company. In considering the question as between the tenant for life and remaindermen in a case of this kind, the intention of the company is, of course, the essential thing to be taken into account. That is the result of *Bouch v. Sproule* (2), and other cases, and it is quite plain that one has to see what the intention of the company was. But in considering this particular case there are two matters to be taken into consideration, apart from the fact that the dividend and the call were made more or less simultaneously and for more or less the same amounts. In the first case there was this arrangement which had been made between the inland revenue and the testator's brother and other persons, whereby no distribution of dividend, apart from any question of calls, was payable so long as that arrangement remained in force. It would not have been open to the company in the face of that arrangement to have paid over to the shareholders the amount of the dividend declared.

The second matter to be taken into account, and in my judgment this is the really decisive matter for this question, is the effect of the legislation in South Africa. The evidence shows that one of the reasons, at any rate, which influenced the company in resolving to declare dividends was the desire to escape the liability for special super-tax which was imposed by the legislation in South Africa. In order to avoid that liability it was essential, having regard to the terms of that legislation, that there should be a distribution in each year of dividends amounting to 75 per cent. of the company's profits in the Union. If the intention

of the company was to avoid that liability, it was necessary that there should be a distribution of profits, and that undoubtedly was one, at any rate, of the motives which induced the company to declare the dividend. It is, therefore, impossible, in my view, to assume that the company by making these calls intended to capitalise the amount of the dividends because they would by that means have defeated the very reason and object for which they were intending to declare these dividends. Obviously it would not be a distribution in each year of dividends if, the moment the dividends were declared, the company said it was not going to distribute any part of them to its members but was going to retain them for its own purposes. Once one sees what the motive of the company was which induced it to declare these dividends, it is impossible to impute to the company in the same breath an intention to defeat that object, and, having regard to all the circumstances of this case, I have come to the conclusion that the dividends declared by the resolutions of Mar. 31, 1932, and the subsequent years up to 1935 are income and not capital and there will be an order accordingly. Solicitor and client costs of all parties to come out of the estate.

Solicitors: *Wild, Collins & Crosse* (for the plaintiffs); *Nash, Field & Co.* (for all the defendants except the second defendant); *Gregory, Rowcliffe & Co.* (for the second defendant).

[Reported by C. M. YOUNG, *Barrister-at-Law.*]

Re J. & P. COATS, LTD.'S APPLICATION.

[COURT OF APPEAL (Lord Wright, M.R., Slessor and Romer, L.JJ.),
June 24, 25, 26, 1936.]

Trade Marks—Application to register—Distinctive word—"Sheen"—Machine twist—Registrar consulting Manchester Merchandise Marks Committee after hearing completed—Trade Marks Acts, 1905 to 1919, ss. 9 (5), 64 (14).

The applicants applied to register the word "sheen" in class 23 in respect of machine twist being sewing cotton. After hearing the applicants but before delivering his grounds for refusal, the registrar requested the Keeper of the Cotton Marks to consult the Trade and Merchandise Marks Committee of the Manchester Chamber of Commerce as to whether it was desirable to register this word. Neither the question nor the answer was communicated to the applicants. The application was refused on the grounds that "sheen" was one of a class of words which never could become distinctive of the goods of the applicants but should be left free for the whole trade to use. On appeal to the judge it was found that the word "sheen" had in fact become distinctive of the goods of the applicants and the registrar was directed to proceed with the application. The registrar appealed:—

HELD: (i) there was sufficient evidence of the distinctiveness of the word "sheen" to justify the judge's finding that it was distinctive and therefore registrable.

(ii) it is irregular for the registrar to seek the opinion of the Trade and Merchandise Marks Committee of the Manchester Chamber of Commerce after the close of the hearing of an application to register a trade mark.

[EDITORIAL NOTE. For a mark to be registrable as being distinctive, it must be shown not to be a word commonly used in the trade to describe the article. It would appear that in the present case the word "sheen" was known and used in the trade only to describe the applicants' goods, and the word "lustre" was generally applied to others. This was sufficient to allow registration.

FOR THE REQUIREMENTS FOR REGISTRATION, see HALSBURY, 1st Edn., Vol. 27, Trade Marks, Trade Names and Designs, pp. 696-698, para. 1261; and FOR CASES see DIGEST, Vol. 43, pp. 145-155, Nos. 66-138.]

Cases referred to:

- (1) *Re Alexander Pirie & Sons, Ltd., Trade Mark* (1933), 50 R.P.C. 147; Digest Supp.
- (2) *Banham (George) & Co. v. Reddaway (F.) & Co.*, [1927] A.C. 406; 43 Digest 183, 337.
- (3) *Re Crosfield (J.) & Sons, Ltd.*, [1910] 1 Ch. 130; 43 Digest 153, 114.
- (4) *Sharpe (W. N.), Ltd. v. Solomon Bros., Ltd., Re Sharpe (W. N.) Ltd.'s Trade Mark* (1914), 84 L.J. Ch. 290; 32 R.P.C. 15; 43 Digest 143, 57.
- (5) *Re Liverpool Electric Cable Co., Ltd.'s Applications* (1928), 46 R.P.C. 99; Digest Supp.
- (6) *Trade Marks Registrar v. Du Cros (W. & G.), Ltd.*, [1913] A.C. 624; 43 Digest 155, 138.
- (7) *Hommel v. Gebrüder Bauer & Co.* (1904), 22 R.P.C. 43; 43 Digest 138, 20.
- (8) *Re Davis's Trade Marks, Davis v. Sussex Rubber Co.*, [1927] 2 Ch. 345; 44 R.P.C. 412; 43 Digest 145, 67.
- (9) *Re Cassella (Leopold) & Co.*, [1910] 2 Ch. 240; 27 R.P.C. 453; 43 Digest 143, 54.
- (10) *Re Gramophone Co.'s Application*, [1910] 2 Ch. 423; 27 R.P.C. 689.

- (11) *Re California Fig Syrup Co.*, [1910] 1 Ch. 130 ; 26 R.P.C. 846 ; 43 Digest 143, 53.
- (12) *Re National Cash Register Co.'s Application* (1917), 34 R.P.C. 354 ; 43 Digest 152, 109.
- (13) *Re National Galvanizers, Ltd.'s Application* (1920), 37 R.P.C. 202 ; 43 Digest 154, 126.
- (14) *Re Keystone Knitting Mills Trade Mark* (1928), 45 R.P.C. 421 ; 43 Digest 193, 414.
- (15) *Re Brock (H. N.) & Co., Ltd.*, [1910] 1 Ch. 130 ; 43 Digest 141, 37.

APPEAL from a judgment of LUXMOORE, J., dated June 7, 1935.

The respondents, J. & P. Coats, Ltd., applied for registration of the word "sheen" as a trade mark in class 23 in respect of machine twist being sewing cotton. The application was made to the Keeper of the Cotton Marks, who made a report to the Registrar of Trade Marks. After hearing the applicants, the registrar requested the Keeper of the Cotton Marks to consult the Trade and Merchandise Marks Committee of the Manchester Chamber of Commerce. The registrar refused the application to register the mark and the applicants appealed to the court. LUXMOORE, J., allowed the appeal, and held that the evidence proved that the word "sheen" had in fact become distinctive of the goods of the applicants and ought to have been registered by virtue of the Trade Marks Acts, 1905 to 1919, s. 9 (5). The registrar appealed to the Court of Appeal.

The Attorney-General (Sir Donald Somervell, K.C.) and Lionel Heald, for the appellant.

Trevor Watson, K.C., and Robert Burrell, for the respondents.

The Attorney-General : The word "sheen" has been largely used by the applicants since 1912, and it is not disputed that it has become associated with their goods. Machine twist is mercerised and therefore has a glossiness which is an important quality in these goods. The technical term for it is "lustre." "Sheen" is an English word denoting glossiness or shininess, and is therefore descriptive of this important quality. It is not enough to produce evidence that the word has in fact become distinctive of the goods of the applicants. Descriptive words as well as laudatory words are objectionable and may be refused. Traders ought not to be allowed to appropriate such words. Obviously descriptive words are not permissible. Great weight ought to be attached to the registrar's decision in these cases : *Re Alexander Pirie & Sons, Ltd., Trade Mark* (1) ;

[He also referred to *Re Crosfield (J.) & Sons, Ltd.* (3) ; *Re Cassella (Leopold) & Co.* (9) ; *Trade Marks Registrar v. W. & G. Du Cros, Ltd.* (6) ; *Re Davis's Trade Marks* (8) ; *Re Liverpool Electric Cable Co.* (5) ; and *Re Gramophone Co.'s Application* (10)].

Heald : There are cases where the evidence of distinctiveness is overwhelming and yet the word is unregistrable : *Re Crosfield (J.) &*

Sons, Ltd. (3). There is a particularly heavy onus on a person seeking to register a word which is descriptive : *Sharpe (W. N.), Ltd. v. Solomon Bros., Ltd.* (4). A word may be refused because of its inherent objectionableness : *Re Davis's Trade Marks* (8). [He also referred to *Re California Fig Syrup Co.* (11), *Re National Cash Register Co.'s Application* (12), and *Re National Galvanizers, Ltd.'s Application* (13).]

Trevor Watson, K.C. : It is not disputed that the word has become distinctive throughout the United Kingdom, but it is suggested that there is a class of words which can never be registered and that "sheen" is such a word. There is a direct power under the Trade Marks Acts to register words which are not only descriptive but which also have a direct reference to the goods. In *Re Crosfield (J.) & Sons, Ltd.* (3), it was held that mere laudatory epithets were unregistrable. The *Liverpool Cable Co.* case (5) extended the prohibition to geographical terms of a certain type. The word "sheen" is not a word that a person would naturally desire to use for this type of goods ; it is not the only possible word, and in fact the word "lustre" is used in the trade to describe glossiness. This distinguishes the present case from all other cases, e.g., *Re Cassella (Leopold) & Co.* (9) and the *Liverpool Cable Co.* case (5). [He also referred to *Re Gramophone Co.'s Application* (10) and *Re National Cash Register Co.'s Application* (12).]

After the hearing, the registrar asked the Keeper of Cotton Marks to take the opinion of the Manchester Chamber of Commerce Committee and then refused the application. The Keeper of the Cotton Marks has finished his duty when he has made his report under sect. 64 (4), and is then *functus officio* ; the registrar has no right to obtain assistance from the Chamber of Commerce, particularly after the hearing is finished.

Burrell : The usages of the trade should be considered. There is no evidence of embarrassment in the past although the mark has been used for many years, and there is no reason to assume it will cause any confusion in the future : *Banham (George) & Co. v. Reddaway (F.) & Co.* (2). Once a mark is proved to be distinctive, the question is—is there any ground for refusing to register it ? *Re National Cash Register Co.'s Application* (12). [He also referred to *Re Keystone Knitting Mills Trade Mark* (14) and *Re Davis's Trade Marks* (8).]

Heald, in reply : It is suggested by the respondents that there are cases in which the word "perfection" might be registered ; FLETCHER MOULTON, L.J., said that in no case could that be possible. It is wrong to say that any laudatory word might be registered provided it is distinctive. A person might honestly wish to use "sheen." Registration is a privilege, not a right. The Keeper of the Cotton Marks is to act under the direction of the registrar, and by sect. 64 (14) the procedure existing when the Act was passed is to be continued.

LORD WRIGHT, M.R. : This is an appeal from a judgment of LUXMOORE, J., who has arrived at a different view from that taken by the registrar in the matter in question, which is whether or not a trade mark should proceed to registration.

The trade mark in question is the name "sheen," and the goods to which it has been applied in practice, and in respect of which it was sought to register the trade mark, is "machine twist." The applicants are the well-known firm of J. & P. Coats, Ltd., and the goods in question consist of mercerised threads or twist used in sewing machines. The particular mark has been used by the applicants since 1912, and the evidence is that the applicants have sold since 1912 until I suppose some date just before these proceedings commenced in 1933, 162 million reels of this mercerised thread under the mark "sheen," or in some cases "super sheen." I gather "sheen" without the "super" was the more common. The evidence of this constant and very large sale of the article under this name has not been disputed. The evidence is overwhelming, consisting, I believe, of 186 affidavits, but this court has been spared, through the admissions made by the Attorney-General, the task of looking into more than a very few of this enormous collection and accumulation of material. We have, from the point of view of the public, the affidavit of a buyer—if I may refer to one of the many affidavits which have been produced from every corner of the country—a Miss Sanderson Hutton, of Haddington. She says she has been

accustomed to purchase for domestic use machine twist of the merchandise of the applicants J. & P. Coats, Ltd., under their "sheen" spool ticket which I have used for fifteen years and another variety of their "sheen" machine twist which is sold under their "super sheen" spool ticket which I have used for four years.

That is only one of an enormous number of others showing that in the public mind, as buyers of this particular article, the word "sheen" is, as this deponent says :

used by J. & P. Coats, Ltd., as trade marks to distinguish their machine twist from that of other manufacturers or merchants.

That is one affidavit from a great mass of evidence from the public, and it shows the position of this word in connection with this article in the public mind and that the word in this connection indicates to the public that what is being dealt with is the manufacture of the applicants. There is only one other affidavit out of the host, that I need refer to, and that is an affidavit of Mr. Charles Henry Brotherton, a director of the English Sewing Cotton Co., Ltd., and a gentleman of very great experience in these matters; he has been a member of the Trade and Merchandise Marks Committee of the Manchester Chamber of Commerce since 1924. His company is a very large concern having

sixteen associated companies ; it is a keen competitor of the applicants. He, speaking with his great knowledge of the trade, says that :

“ sheen ” and “ super sheen ” have in the sewing cotton trade generally become well known as denoting exclusively machine twist of the applicants’ merchandise and as distinguishing their machine twist from that of any other sewing cotton manufacturer or merchant. I do not know of any trade mark, other than the “ sheen ” or “ super sheen ” marks of the applicants, which is or has ever been in use upon sewing cotton which includes the word “ sheen ” either alone or as a prefix or suffix or in association with a device.

He goes on to say that in the sewing cotton trade the word “ sheen ” is not in common use in the trade as a descriptive term ; it is true that it means gloss, but, he says :

throughout my whole experience I have found that the gloss on mercerised thread is in the sewing cotton trade referred to as “ lustre ” and not as “ sheen.”

I refer to that at once, because although the word “ sheen ” is a substantive in more or less common use as describing a bright and shiny surface on a fabric, among other things, it is not as the evidence goes—and I may perhaps refer to this one passage—a word generally used in that connection in the sewing cotton trade.

The registrar has referred to some cases in dictionaries, trade dictionaries and specifications in which the word is used, but the evidence is overwhelming that it is not the ordinary or the natural word which in the trade would be used. The word “ lustre,” on the other hand, is a very common term in the trade, and there has been produced an enormous number of sample marks in which the word “ lustre ” is used, but no mark in which the word “ sheen ” is used. I need not refer to that type of evidence any more because it is so clear and so overwhelming in this case that, as I have already said, it has not been the subject of any contest here. The registrar pronounced that the mark should not be registered. That is the issue to be decided here.

LUXMOORE, J., took a different view. It is perfectly clear, as was said by LORD TOMLIN in *Re Alexander Pirie & Sons, Ltd., Trade Mark* (1), that the court, while determining the weight to be attached to the registrar’s view, must exercise its own mind upon the solution of the problem under consideration. LORD TOMLIN prefaced that by saying that the court should attach great weight to the registrar’s conclusion upon any matter which falls pre-eminently, as these matters do, within his experience. To the same effect VISCOUNT DUNEDIN in *George Banham & Co., Ltd. v. F. Reddaway & Co.* (2), at p. 413, says :

Now, it is true that an appeal lies from the decision of the registrar, but in my opinion, unless he has gone clearly wrong, his decision ought not to be interfered with.

With great respect to the learned Lord, the word “ clearly ” may perhaps

be regarded as tautologous. If, in the view of the court, examining all the circumstances, the registrar has gone wrong, then that must mean he has gone clearly wrong. The only matter to observe is that *prima facie* the registrar's decision will be regarded as correct. VISCOUNT DUNEDIN added some observations which appear to me to be very important. He says :

The reason for that is that it seems to me that to settle whether a trade mark is distinctive or not—and that is the criterion laid down by the statute—is a practical question, and a question that can only be settled by considering the whole of the circumstances of the case.

That observation appeals to me with peculiar force after examining all the numerous cases which have been cited on matters analogous to that which is in question here.

There is, however, in this case, a particular reason why the court should be careful in looking at the decision of the registrar. It appears from his decision that after the hearing had taken place before him, a hearing at which the applicants were represented, and before he delivered his grounds for refusal, he consulted, through the Keeper of Cotton Marks, with the Trade and Merchandise Marks Committee appointed by the Manchester Chamber of Commerce, in doing so put a certain question to the committee and received an answer. Neither the question nor the answer were at that stage communicated to the applicants. The registrar gave his decision with that additional material before him, and which the applicants had had no opportunity of answering or considering or dealing with at all. On general principles that would seem to be a very undesirable course to adopt. It is also complained here that the question is not a question very appropriate in the circumstances. The question propounded to the committee was :

Are there any special facts or circumstances in or connected with the textile trade which would cause this word mark in your opinion to be an unsuitable one for distinguishing the goods of any one firm from similar goods of another firm ?

The answer to that was : “ Yes ” ; they thought that the word “ sheen ” was one of those which should be left open to the trade and not appropriated by any one trader no matter how strong the evidence put in. There are two points to observe there : the first is that the question is not limited to the particular matter of machine twist, which was the only matter in connection with which the mark was sought to be registered. It is a question directed to the textile trade in general. The other matter is that the answer seems to answer the precise question on which the registrar has to come to a decision. As I have said, on general principles that seems a very undesirable course to adopt, but I have not been able to find in sect. 64, which is the only section relevant on this matter, any justification for the course which was

taken. The Keeper of Cotton Marks is referred to in sect. 64 (4), which is as follows :

Every application so made to the Manchester branch shall be notified to the registrar in the prescribed manner together with the report of the Keeper of Cotton Marks

and so on. The application is made to the Manchester branch—that is under subsect. (3)—and the Keeper of the Manchester branch is the Keeper of the Cotton Marks ; it is his duty to make a report to the registrar. With reference to that there is the further subsect. (14) as follows :

The existing practice, whereby the Keeper of the Manchester branch consults the Trade and Merchandise Marks Committee appointed by the Manchester Chamber of Commerce upon questions of novelty or difficulty arising on applications to register cotton marks, shall be continued by the Keeper of Cotton Marks.

As I read that with the other parts of the section, it means that the Keeper of Cotton Marks before reporting to the registrar is to be entitled to consult the committee appointed by the Manchester Chamber of Commerce, but, reading the section as a whole and also looking at the natural reasoning of the circumstances, that would seem to be limited to the time before the Keeper of Cotton Marks has made his report ; it is to enable him to make his report to the registrar. I cannot find under sect. 64 any provision which gives a more extended power to the Keeper of Cotton Marks to consult or which enables the registrar to take the course which he took in this case. The question is only here material because if, as appears to be the case, the registrar at an inappropriate moment and in an inappropriate fashion, sought and obtained the advice of the committee of the Manchester Chamber of Commerce, he acted upon material which he was not, so far as I can see, entitled to use. It is quite clear from his report, in which he sets out the answer they gave, that it must have had some very considerable effect upon his decision. In those circumstances the court is required in a peculiar sense to examine the matter independently and to come to its own conclusion, as indeed LUXMOORE, J., did. I fully agree with the conclusion at which LUXMOORE, J., arrived and, in order to explain why I do so, I must refer to the Trade Marks Act, s. 9, which is as follows :

A registrable trade mark must contain or consist of at least one of the following essential particulars.

Then it requires the name of a company, individual or firm ; the signature of the applicant for registration, and whether it is an invented word or invented words. No special point arises upon those. Then para. (4) is :

A word or words having no direct reference to the character or quality of the goods, and not being according to its ordinary signification a geographical name or a surname.

Then para. (5), which was added to the Act of 1905 and which carries forward obviously the power of allowing the registration of a trade mark far beyond the limits provided for by para. (4), is as follows :

Any other distinctive mark, but a name, signature, or word or words, other than such as fall within the descriptions in the above paras. (1), (2), (3) and (4), shall not be registrable under the provisions of this paragraph, except upon evidence of its distinctiveness.

Then there is a proviso as follows :

For the purposes of this section "distinctive" shall mean adapted to distinguish the goods of the proprietor of the trade mark from those of other persons. In determining whether a trade mark is so adapted, the tribunal may, in the case of a trade mark in actual use [such as that now in question] take into consideration the extent to which such user has rendered such trade mark in fact distinctive for the goods with respect to which it is registered or proposed to be registered.

I only desire to refer to two or three other sections quite shortly. Sect. 11 deals with restrictions on registration ; that is to say, it prohibits the registration of a trade mark or part of a trade mark containing any matter the use of which would, by reason of its being calculated to deceive or otherwise, be disentitled to protection in a court of justice. Then sects. 19, 20 and 21 deal with concurrent or identical trade marks. Sect. 21 also gives the court power to permit registration of the same or nearly identical trade marks subject to conditions which it thinks it right to impose. Sect. 44, which has been a good deal referred to in this case, is in these terms :

No registration under this Act shall interfere with any *bona fide* use by a person of his own name or place of business or that of any of his predecessors in business, or the use by any person of any *bona fide* description of the character or quality of his goods.

It has been assumed in this case that the word "sheen" is descriptive of the character or quality of the goods in question ; that is to say, it is descriptive of the fact that if you take the bobbin you see a distinct sheen or brightness or gloss or lustre on the rolled thread. I suppose that each line of thread, if it was unravelled, would also show the same qualities.

The applicants' case, which has found favour with LUXMOORE, J., is that under the precise terms of the Act and in accordance with the authorities, this is a trade mark which ought to be registered. In all the facts of the case the various authorities which have been cited do not seem precisely to cover the facts of this case and one would expect to find that to be so. As LORD DUNEDIN pointed out, in each case it is a practical matter to be decided by considering the whole of the circumstances. The argument on behalf of the Board of Trade is this : it is admitted that the fact of user, and especially user for the length

of time and the completeness as is evidenced in this case, is a vital matter to be taken into account ; but it is said, from the very nature of the word the application must be refused, because the word falls under a category or class in which—I suppose as a matter of principle—registration must be refused. I find myself unable to accept that view. It is, however, necessary to refer to some more detailed considerations in order to test the various arguments which have been put before the court and I may perhaps more conveniently refer now to the different authorities.

The starting point is the decision of this court in the case of *Re Crossfield (J.) & Sons, Ltd.* (3), and particularly that part of the decision which deals with the application to register the word “perfection” in relation to the applicants’ soaps. The judgment of FLETCHER MOULTON, L.J., is of very great value. He points out the change which had been made by the Act of 1905 which came into force in 1906. He also points out that para. (5), the added paragraph, can only receive effect if it is understood as applying to words which are descriptive, which have a direct reference to the character or quality of the goods and also for geographical names and to surnames. The whole point of para. (5) is to extend the grant of registration of trade marks beyond these limits. FLETCHER MOULTON, L.J., says at p. 145 :

Much of the argument before us on the part of the opponents and the Board of Trade was based on an assumption that there is a natural and innate antagonism between distinctive and descriptive as applied to words, and that if you can show that a word is descriptive you have proved that it cannot be distinctive. To my mind this is a fallacy. Descriptive names may be distinctive and vice versa.

Then later on, at p. 146, he says :

Under the provisions of the present Act the court clearly has power to allow descriptive words to be registered if a case on the merits is proved before it sufficiently strong to induce it to do so.

Then FLETCHER MOULTON, L.J., goes on to consider certain principles which he thinks may be useful, and says, at p. 147, that an applicant

may support his application . . . by showing that by user the mark has in fact become more or less completely identified with the goods by having been continuously used in connection therewith, and the statute expressly provides that the court may take this into consideration for the purposes of its decision. To my mind this provision can bear but one interpretation. It recognises that distinctiveness, i.e., being adapted to distinguish the goods from those of other traders, is not necessarily an innate quality of the word. It may be acquired.

Then he uses the phrase of FARWELL, L.J., during the argument that the reply of the applicant is of the type of

solvitur ambulando : it can denote my goods because it actually does so.

FLETCHER MOULTON, L.J., is there dealing with the word “perfection.” Then he says, at pp. 147 and 148 :

The extent to which the court will require the proof of this acquired distinctiveness to go will depend on the nature of the case. If the objections to the word itself

are not very strong, it will act on less proof of acquired distinctiveness than it would require in the case of a word which in itself is open to grave objection. I do not think, for instance, that any amount of evidence of user would induce a court to permit the registration of ordinary laudatory epithets such as "best," "perfect," etc. On the other hand, in the case of a peculiar collocation of words, it might be satisfied with reasonable proof of acquired distinctiveness, even though the words taken separately might be descriptive words in common use. In this connection the provisions of sect. 44 afford, in my opinion, useful guidance. The registration is not to affect the use of the words by other traders in any *bona fide* description of the goods. The court will therefore do well to ask itself the question, will the registration of the trade mark cause substantial difficulty or confusion in view of these rights of user by other traders? [That is the right of user which is recognised by sect. 44.] If the answer is in the affirmative, the court will probably hesitate to allow the word to be registered. But if the answer be in the negative, either by reason of the nature of the words, or because past user has limited the possibility of other traders safely or honestly using the words, the court may well grant the desired permission.

Before I leave this case, I should like to read one short passage from the judgment of FARWELL, L.J., at p. 151, where, dealing with this subsection, he says :

The whole basis of the enactment is that the word or words to be registered must be distinctive, i.e., adapted to distinguish the goods of the proprietor of the trade mark from those of other persons ; and this is obviously right and just, for a trade mark is necessarily a monopoly, and although it is no doubt proper and not injurious to any honest man to allow a trader to monopolise a trade mark in certain cases, it would be wrong to allow to any one man a monopoly of ordinary words, commonly used in the trade and simply descriptive of the nature or colour or laudatory of the quality of the goods ; e.g., cotton—blue—good. The question is not merely one between the applicants and the opponents who appear before the tribunal.

Then FARWELL, L.J., goes on to point out that the interest of the public must be considered. Applying these rules, which have been constantly supported and approved, to the circumstances of this case, it is clear beyond any question that the trade mark "sheen" has become distinctive of the applicants' goods of the class to which they are applied. He can say : "They can denote my goods because they actually do so." The argument is that however true that may be, yet there is something in the nature of the word itself, as used in this connection, which renders it incapable of being registered as a trade mark. That is the argument which has been pressed at such length.

I do not think, dealing with the particular circumstances of this case, as I must, as a practical question, that any such argument is made out. The word "sheen" in this connection is clearly not a merely laudatory word like "perfection" or "best" or "classic" or "universal" or "artistic." To use the words which are the subject of discussion in *Sharpe, Ltd. v. Solomon Brothers, Ltd.* (4), they are words which describe the character of the goods, but they are not the only or natural words which would be chosen for that purpose. With regard to the *Orlwoola*

case (15), referred to in the *Crosfield* case (3) from which I have just read, "orlwoola" was a simple description of the character of the goods, apparently not correct, with the laudatory observation that the goods were all wool, the words being mis-spelt. There you had an attempt to monopolise the natural description of woollen goods—that and nothing else. In the same way the word "diamine" was rejected as being a possible trade mark because it simply described the ordinary chemical constitution of an article of ordinary commerce; similarly the word "gramophone" was not admitted to registration as a trade mark because it simply described what we all know as a gramophone with a disc. It is perfectly true that in the gramophone case there was evidence that in the trade it was necessarily identified with the products of the applicants; but against that was the admitted fact that in the eyes of the public it meant, and only meant, a machine whether made by the applicants or not. The word "sheen" in this case does not appear to me to assimilate itself to any of those categories. As I have already said, so far as the trade is concerned, the natural word to use and the word normally and habitually used in connection with glossiness is "lustre." Therefore, the use of the word "sheen" is something special; it is not merely a colour description, a description of something by a mere colour such as "blue" or any word of that sort; it is the peculiar use of a word which is rather poetic and obsolete or in unfamiliar use and which is not customary in this particular connection. So that so far as the word is concerned it does not appear to me to come within those cases in which a word has been rejected on the grounds which I have stated; nor is there any danger of it failing to satisfy the test which has been put, namely: Is it a word which is likely to harass or embarrass an honest trader in the exercise of his rights to use an ordinary word under sect. 44 in order to describe something in which he is dealing? Is it likely to impede an honest trader in the use of the word "sheen" if he wants to use it as a *bona fide* description of the character or quality of his goods? It seems to me very unlikely that any such contingency would arise, but, if it did arise, so far as I can judge, there is no probability at all that the danger which has been complained of would follow, nor does this case appear to me to align itself with an authority which has been very much pressed upon this court, that is, the case of *Re Liverpool Electric Cable Co., Ltd.* (5). In that case the cable company had been carrying on the business of manufacturing cables at Liverpool for a great number of years—in fact since the year 1901—and the case was tried in 1929. It was proved and not denied that in that connection they had sold electric cables under the name of "Liverpool cables" to the extent of £2,000,000 worth. ROMER, J., as he then was, held in those circumstances that "Liverpool" was entitled to registration in connection with the applicants' cables. He held that it was a geographical term; it

had no special significance in connection with cables, and that the use of the applicants' mark in connection with "Liverpool cables" had been so established, and that the words were capable of being associated and were in fact associated with the cables in question. That decision, however, was reversed by the Court of Appeal on a number of grounds; one ground seems to have been that the registrar had exercised a discretion and that the learned judge had not purported to exercise any discretion of his own in the matter, and, accordingly, the original discretion of the registrar should stand. In addition to that it was held by the Court of Appeal that the word "Liverpool" was one which was likely to be a desirable term to use in connection with articles of industry, Liverpool being a great industrial centre. It was said it was undesirable that any one firm should monopolise that term. LAWRENCE, L.J., states that point of view in very few words. He says at p. 123:

In my opinion it is in every case a question of degree to what extent it is permissible to monopolise a geographical name associated with the name of an ordinary article of commerce. In the present case, for the reason stated, I think that it would be wrong to give the applicants the monopoly of calling their cables "Liverpool cables." If that were done it seems to me that future manufacturers of or traders in cables at Liverpool would, to use the words of FLETCHER MOULTON, L.J., be placed in difficulties by having to avoid describing their goods in ordinary language.

That being, as I understand it, the reason why the Court of Appeal arrived at the decision it did in the *Liverpool Cables* case (5), I find it quite impossible to apply that reasoning to the facts in this case. The particular ground as to why the monopoly was held to be undesirable there do not apply here. There is no evidence that anybody has ever wanted or desired to use the word "sheen" in connection with goods of this character or on any textile, and I see no reason at all why this word which has established itself as the trade mark associated with the name of Coats, so that anyone asking for "sheen" thread or machine twist would naturally and inevitably be taken to be asking for the manufacture of a twist or thread manufactured by Coats, should not be accepted and given the status of a trade mark.

I have not referred to a great many of the authorities which have been put before the court in this case. It seems to me that most of these authorities are dealing with the particular facts of the particular cases. There are no doubt observations of great value in the case of *Trade Marks Registrar v. W. & G. Du Cros, Ltd.* (6), but as I read the decision in that case, and in particular the language of LORD PARKER, at p. 637, the difficulty there was that there was not evidence of a sufficiently extensive user either as regards area or time to enable the court to say that the registration should proceed. LORD PARKER says:

distinctiveness in fact is not conclusive—[that is quite obviously so]—and the extent

to which the tribunal will be influenced by it must, in my opinion, depend on all the circumstances, including the area within which and the period during which such distinctiveness in fact can be predicated of the mark in question.

As I have already pointed out more than once in this case, the distinctiveness in fact is as wide and as long continued as one could expect to find in any case. For all these reasons, I think the appeal fails and should be dismissed.

SLESSER, L.J. : I agree. I think that the learned judge was right in coming to the conclusion that this trade mark should be registered in accordance with the power conferred under the Trade Marks Acts, 1905 to 1919, s. 9 (5). In my judgment he was right in thinking that there was sufficient evidence of the distinctiveness of the mark to justify that opinion, and that the mark was adapted to distinguish the goods of the proprietor of the trade mark from those of other persons. In coming to that conclusion the learned judge must also have decided that this word had lost, in connection with these goods, whatever primary meaning might have normally attached to the word "sheen."

In my opinion what really has here to be considered when one has regard to the cases, and more particularly to the case of *Re Crosfield (J.) & Sons, Ltd.* (3), to which my Lord has referred, which was approved in principle by the House of Lords in the *W. & G. Du Cros, Ltd.*, case (6), is this question whether, as FLETCHER MOULTON, L.J., as he then was, puts it, the words used will or will not cause difficulty or confusion in view of the right of other traders to use the word as a description of their goods, a right which is conferred upon them by sect. 44. As is pointed out by VAUGHAN WILLIAMS, L.J., in *Hommel v. Gebrüder Bauer & Co.* (7), where the primary meaning of the word is simple and easy, it may be extremely difficult to establish that in any particular trade the word has lost its well-known and original meaning. FARWELL, L.J., points out an illustration of such a case in the *Crosfield* case (3) when he says, at p. 151, that

it would be wrong to allow to any one man a monopoly of ordinary words, commonly used in the trade and simply descriptive of the nature or colour or laudatory of the quality of the goods ; e.g., cotton—blue—good.

In my opinion the word "sheen" is not such a word simply descriptive of the quality of these goods. It may be that in one view these goods may be said to possess a sheen ; but it is not in my view simply descriptive of the quality and it has not a simple and easy, primary meaning. The word "sheen" for the most part has been favoured by the poets, so I gather from a perusal of MURRAY'S NEW ENGLISH DICTIONARY ; it appears in Burns, in Byron, in Coleridge and in Shelley, and, as we know, it finds expression in the well-known hymn "Jerusalem the Golden,"

where it says: "The pastures of the blessed are decked in glorious sheen." The word "sheen" is in my opinion on the whole an artistic and beautiful word, and not a word in so much common and primary use that it can be said to have such an easy and primary meaning that it is almost impossible to establish that it has lost its primary meaning. I think on the evidence this word has therefore lost its primary meaning.

There is only one matter I have to add. There are suggestions to be found in the *Liverpool Cables* case (5), that great regard should be had to the exercise of the discretion of the registrar. In the present case, however far the view of the *Liverpool Cables* case (5) may or may not be taken, I am not troubled with the decision of the registrar, because for the reasons stated by my Lord, I think that the registrar in this case misinterpreted the Trade Marks Act, 1905, s. 64 (14), and instead of allowing the Manchester Chamber of Commerce merely to give assistance to the Keeper of Cotton Marks on the application of the Keeper of Cotton Marks when an application is made to the Keeper under subsect. (4), he himself after he had received the report of the Keeper of Cotton Marks apparently sought advice, after the hearing of the application had been concluded, through the Keeper, of the Manchester Chamber of Commerce. I say nothing as to the question which was then put to that chamber, but in any case, in my view, that proceeding was irregular, not authorised by the section, and I think may well be said in a sense to be contrary to natural justice in that the applicant was never told of the results of that question and answer.

These matters seem to me to be sufficient to justify the court here in treating the finding of the learned judge, who had the evidence before him, as the primary finding. It is his discretion which he has exercised, and it is a discretion which I think he was fully entitled to exercise under the Act, and one which there is no reason why we should disturb.

ROMER, L.J. : In this case the court is once more asked to consider the operation and effect of the Trade Marks Acts, 1905 to 1919, s. 9 (5). It is a subsection that has formed the subject matter of a great number of decided cases. I confess with surprise that that should be so, because the language of the subsection seems to me to be as clear as daylight. The subsection provides so far as is material for present purposes that any word or words having a direct reference to the character or quality of the goods shall not be registrable except upon evidence of their distinctiveness. That appears to me to say as clearly as possible that if there is evidence of distinctiveness the word or words are registrable. It is perfectly plain, and it has been pointed out in more than one case, that there are certain words which it is hopeless to suppose can ever have lost their primary meaning, and have acquired a secondary meaning indicating a particular origin of certain goods.

I will not at this period of the day read the passages in the reported cases in which one learned judge or another has pointed that out. It will be sufficient to refer to what was said by SIR HERBERT COZENS-HARDY, M.R., as he then was, in the *Perfection* case (3), at p. 141 ; what was said by FLETCHER MOULTON, L.J., at p. 148, and what was said by FARWELL, L.J., at pp. 152 and 153. I may perhaps refer also to what was said by SARGANT, L.J., in the *Ustikon* case (8). I should also like, if I may, to refer to what I said myself in the *Liverpool Cables* case (5) at p. 107, because although in that case the Court of Appeal came to a different conclusion of fact from that to which I came, I do not find that any member of the court took any different view from what I express there as to the effect of what had been said by COZENS-HARDY, M.R., FLETCHER MOULTON, FARWELL, and SARGANT, L.JJ. It seems to me, therefore, that there are certain words which from their very nature are incapable of losing their primary meaning ; such a word is "good." If a witness went into the witness box and said that when any man went into a shop and asked for some "good soap," he necessarily meant soap of a particular manufacturer, that witness would not be believed. The same in the case of the word "blue," which was one of the words instanced I think by FARWELL, L.J. If a man went into a hosiers and said he wanted a pair of blue socks, anyone who said that man necessarily meant the socks of a particular manufacturer would be a witness whose evidence was incredible. But there are words which have a direct relation to the character and quality of goods which nevertheless may lose their primary meaning and acquire in a particular trade a secondary meaning as indicating to people interested, whether as traders or as the public in the trade, the goods of a particular manufacturer. When that does occur and the evidence shows that the word has attained a secondary meaning then, in my opinion, the word is registrable as a trade mark. It does not mean, of course, that it necessarily should be registered. The learned registrar has a discretion, and it will be exercised in the manner pointed out by the Act itself. In particular the learned registrar will have to consider sects. 11 and 19, and in considering sect. 11 he must bear in mind the provisions of sect. 44. The test indeed to be applied by the learned registrar in those circumstances is laid down by FLETCHER MOULTON, L.J., in the *Perfection* case (3), at p. 148, in these terms :

In this connection the provisions of sect. 44 afford, in my opinion, useful guidance. The registration is not to affect the use of the words by other traders in any *bona fide* description of the goods. The court will therefore do well to ask itself the question, will the registration of the trade mark cause substantial difficulty or confusion in view of these rights of user by other traders ? If the answer is in the affirmative, the court will probably hesitate to allow the word to be registered. But if the answer be in the negative, either by reason of the nature

of the words, or because past user has limited the possibility of other traders safely or honestly using the words, the court may well grant the desired permission.

A very similar test was laid down by LORD PARKER in *Trade Marks Registrar v. W. & G. Du Cros, Ltd.* (6), at p. 635, where he says :

The applicant's chance of success [of obtaining registration] must, I think, largely depend upon whether other traders are likely, in the ordinary course of their business and without any improper motive, to desire to use the same mark, or some mark nearly resembling it, upon or in connection with their own goods.

He was there talking not indeed of a mark which indicates quality, but his observations are equally applicable to such marks. It is said, and really the appeal is based upon this contention, that the courts have laid down that even though a word having direct reference to the character or quality of the goods has lost its primary signification and has obtained a secondary meaning, is descriptive of some particular manufacturer's goods, and although the use of that mark will cause no confusion whatsoever, nevertheless the mark must be refused by the registrar because it is not registrable.

I know that when the legislature introduces a change, especially a striking change in the law, there is always a tendency in the courts to put that construction upon the amending legislation that makes the change in the law as small as possible, but in all these cases the Act with which the court is dealing is capable, or, at any rate, is thought by the court to be capable of the restricted construction that the court places upon it. In the present case the words of the section are not capable of that construction. If there be any such limitation upon the power of the registrar as is suggested by the arguments on behalf of the appellants in this case, that limitation must be found in the Act, and it cannot be imposed under the guise of an exercise of discretion either on the part of the registrar or on the part of the court.

In view of those circumstances, I confess that I felt at once very sceptical as to whether I should find that any court has laid down any such proposition as that for which the appellants are contending. At this stage I do not propose to go through the decisions at length. I do venture to say this, however, that in not a single one of the authorities to which our attention has been called, if they be really critically examined, will any authority be found for the proposition. In every case the question is a question of fact, that is to say, where evidence proves conclusively that a descriptive word has lost its primary meaning, and has acquired a secondary meaning, it is a question of fact whether the registration of that mark will or will not cause confusion. The word is not merely by reason of the fact that it is a descriptive word incapable of registration. The Act, in my opinion, says in plain words it is registrable. When we come to look at the evidence in this case, it seems to me to be perfectly

plain that applying the test which FLETCHER MOULTON, L.J., and LORD PARKER said should be applied, that no one can *bona fide* use the word "sheen" by itself as descriptive of his goods, honestly. He may want in the future to say that his cotton thread has a nice sheen. The registration of this mark will not prevent him from doing so. I do assert in face of the evidence that no one can wish in the future to describe his cotton as "sheen" cotton if he has an honest intention. That being so, it appears to me that there can be no confusion in the future by any *bona fide* use by the public or other traders of the word "sheen" in connection with cotton.

That being so, in my opinion this appeal fails. The learned judge was right in reversing, as he did, the decision of the learned registrar. I only add this, that I entirely agree with what has fallen from the other members of the court in reference to the question of the Keeper of Cotton Marks consulting the Committee of the Manchester Chamber of Commerce under sect. 64 (14).

Appeal dismissed ; no order as to costs.

Solicitors : *Solicitor to the Board of Trade* (for the appellant) ; *Grundy, Kershaw, Samson & Co.*, agents for *Grundy, Kershaw, Samson & Co.*, Manchester (for the respondents).

[*Reported by E. FULLER BRISCOE, Esq., Barrister-at-Law.*]

GRAHAME *v.* ATTORNEY-GENERAL OF FIJI.

[PRIVY COUNCIL (Viscount Hailsham, L.C., Lord Russell of Killowen, Sir Lancelot Sanderson, Sir George Lowndes, Sir Sidney Rowlatt),
May 28, 1936.]

Solicitors—Professional misconduct—Solicitor trustee—Breach of trust—Preference to own interest at expense of beneficiary—Nondisclosure of interest—Duty to illiterate persons.

The appellant was suspended from practice as a barrister and solicitor of the Supreme Court of Fiji for professional misconduct. The case against the appellant was twofold.

(i) On Aug. 25, 1923, the trustees of the estate of one Carr, deceased, leased a portion of the trust estate to one Hunt for a period of ten years from May 1, 1923, with an option to purchase the freehold for £4,000. The appellant was Hunt's solicitor at the date of the lease and for some time prior to it. On Jan. 1, 1926, the appellant became a partner with another solicitor, Ellis, who acted for the Carr trustees, the appellant continuing to act for Hunt, but when either was absent from Fiji the partner remaining attended to the affairs of all the firm's clients. The property leased to Hunt improved considerably in value, and in 1932 Hunt consulted the appellant about the exercise of the option. On Nov. 2, 1932, Hunt exercised the option by a written notice to Ellis. On Nov. 4, 1932, Ellis left Fiji and did not return till Dec. 23, 1932. The terms of the purchase were that of the purchase price £4,000, £1,350 were to be paid in cash, and the balance was to be secured by a mortgage at 6½ per cent. Hunt, being unable to provide the necessary funds, agreed to sell the property to the appellant on Nov. 8, 1932, in the terms of the sale to him by the Carr trustees, and the appellant agreed to employ Hunt as his commission agent for the sub-division and sale thereof. The appellant, who had advanced moneys to Hunt on previous occasions, disclosed to Ellis that he was going to finance Hunt to the extent of £1,350, but he did not disclose to Ellis the extent to which he was interested in the transaction. On Mar. 15, 1933, the estate was conveyed to Hunt by the Carr trustees and Hunt executed the mortgage for the balance. The sum of £1,350 was paid by a cheque of the appellant on his own account:—

HELD: the intention to exercise the option originated with Hunt and he solicited the assistance of the appellant to enable him to carry out his intention. In those circumstances, though it is most desirable that a solicitor acting for a client in any transaction should not have a personal interest in that transaction without making full disclosure, there was no duty to the Carr trustees on the part of the appellant, since he had not instigated Hunt to exercise the option, to abstain from assisting his client Hunt to complete the purchase.

(ii) The Public Trustee, as custodian trustee of the estate of one, Vollmer, appointed the appellant managing trustee of that estate on Dec. 22, 1931. On Sept. 6, 1933, the appellant, as solicitor for Hunt, had sent a written notice to Ellis that the amount outstanding on the mortgage by Hunt to the Carr trustees would be paid off on Dec. 15, 1933, and on that day the appellant advanced to Hunt the amount necessary to obtain the transfer of the mortgage, using the funds of the Vollmer estate to repay himself the amount advanced. It was

established that when the appellant gave notice on Sept. 6, 1933, he intended so to use the Vollmer trust funds, and it was admitted that the appellant did not at any time disclose to the Public Trustee his interest in the transaction. On Dec. 18, 1933, the mortgage was transferred to the appellant as managing trustee for the Vollmer estate, the interest being $6\frac{1}{2}$ per cent. per annum, the mortgagor to give 3 months prior notice in writing to repay the principal or any part of it. On Jan. 8, 1934, as managing trustee of the Vollmer estate, the appellant made an agreement with Hunt altering the terms of the mortgage, agreeing that the beneficiaries for whom he was trustee should be paid only $5\frac{1}{2}$ per cent. interest, and that the mortgagor could pay off at any time without prior notice to the mortgagee:—

HELD: in using the Vollmer funds the appellant was in fact lending trust money to himself and thereby committed a serious breach of trust. This in itself was not necessarily sufficient to constitute professional misconduct, but in agreeing to the alteration of the terms of the mortgage, the appellant was considering his own interests in preference to, and to the detriment of, the interests of the beneficiaries and was guilty of professional misconduct.

[EDITORIAL NOTE.] The precise professional misconduct here was that a solicitor being trustee of an estate, advanced part of the trust funds to himself. In addition he made arrangements for reduction of the rate of interest and for easier methods of repayment. In considering this matter their Lordships repeat what was said in *Macaulay v. Sierra Leone Supreme Court Judges*, [1928] A.C. 344; 42 Digest 402, 4558, as to the very great necessity for maintaining the highest standards of professional duty where the clients are natives or half-castes and illiterate people.

AS TO PROFESSIONAL MISCONDUCT, see HALSBURY, 1st Edn., Vol. 26, Solicitors, pp. 850, 851, para. 1376; and FOR CASES, see DIGEST, Vol. 42, pp. 399–406, Nos. 4515–4632.]

Case referred to :—

(1) *Re A Solicitor Ex. p. Law Society* [1912] 1 K.B. 302; 42 Digest 399; 4515.

APPEAL by special leave from the judgment and order of the Supreme Court of Fiji, both dated Nov. 27, 1934, whereby the appellant, who was found guilty of professional misconduct was suspended from practice as a barrister and solicitor in that court from Dec. 8, 1934 to July 1, 1936. The facts are fully stated in the judgment.

Gavin T. Simonds, K.C., and *W. E. Vernon* for the appellant.

F. P. M. Schiller, K.C., and *Kenelm Preedy* for the respondent.

The judgment of their Lordships was delivered by SIR LANCELOT SANDERSON.

SIR LANCELOT SANDERSON: This is an appeal by special leave from an order of the Supreme Court of Fiji, made on Nov. 27, 1934, by the CHIEF JUSTICE of the said court, whereby it was ordered that the appellant, George Frier Grahame, should be suspended from practice as a barrister and solicitor of the said court until July 1, 1936, such suspension to take effect from Dec. 8, 1934, and that the appellant should pay the

costs of the application and the costs of the Public Trustee incidental thereto. Prior to the date of the said order the appellant had practised as a barrister and solicitor in Fiji for seventeen years, and according to the judgment of the CHIEF JUSTICE he had been held in respect by his fellow citizens and he had occupied the highest place among them.

On Oct. 31, 1934, an application was made by the Attorney-General at the relation of the trustees of the estate of the late Harry Granville Nicholas Carr (hereinafter called the Carr trustees) and of the Public Trustee (as custodian trustee of the estate of the late J. H. F. Vollmer, hereinafter called the Vollmer estate) that the appellant should be struck off the rolls of the said court or that he should be suspended from practice as a barrister and solicitor, or that such other order might be made as the court should think right. The ground of the application was that the appellant was alleged to have been guilty of professional misconduct in his capacity as a solicitor in relation to the matters stated in the affidavits which accompanied the application.

The case against the appellant may be divided into two parts.

The first part relates to the estate of the late H. G. N. Carr, and the material facts are as follows: The Carr trustees are Mrs. Esther Rebecca Carr and Frederick Charles Clapcott: probate of the will of the late H. G. N. Carr was granted to them in Dec., 1917. Mrs. Carr, the widow of the late H. G. N. Carr at the material times was living in England, and she had given a power of attorney to Samuel Howard Ellis, who acted as solicitor to the said trustees. F. C. Clapcott was living at Ba in the said colony. On Aug. 25, 1923, the Carr trustees granted a lease of certain land situate in the island of Vitilevu, known as "Vunivisi," of an area of about 446 acres to one John Linn Hunt for the term of ten years computed from May 1, 1923, at a yearly rent of £200. It was provided in the said lease that the lessee should during the currency of the said lease have the option of purchasing all the right, title and interest of the lessors in the freehold lands thereby demised for the sum of £4,000. At the date of the said lease and for some time before that date the appellant acted as solicitor for Hunt. On Jan. 1, 1926, Ellis and the appellant became partners: the firm's name being Ellis and Grahame. Generally speaking, after the formation of the partnership when both partners were in the colony, Ellis attended to the business of the Carr trustees and the appellant acted for Hunt, but when either member of the firm was absent from the colony, the remaining partner attended to the affairs of all the firm's clients. The "Vunivisi" estate improved considerably in value during the term of the lease. In the autumn of 1932, Hunt consulted the appellant as to the above-mentioned option, which he desired to exercise. Hunt was not able to provide the

necessary funds, and he suggested to the appellant that he should find the money required. An arrangement, to which further reference will be necessary, was made between Hunt and the appellant, with the result that on Nov. 2, 1932, Hunt exercised his option by giving notice in writing to Ellis, which was received by Ellis on Nov. 3, 1932. On that day Hunt saw Ellis and it was agreed, subject to Mr. Clapcott's approval, that the sum of £1,350 should be paid in cash and that the balance of the purchase money, viz., £2,650, should be secured by a mortgage on the property, with interest at the rate of 6 per cent. On Nov. 4, 1932, Ellis left the colony and went to Sydney: he returned on Dec. 23, 1932. On Nov. 8, 1932, Mr. Clapcott, having been informed by Ellis of the proposed arrangement, wrote to the firm of Ellis and Grahame approving the arrangement except that he thought the interest should be $6\frac{1}{2}$ per cent. instead of 6 per cent.

On Nov. 8, the arrangement which had been made between Hunt and the appellant was put into writing, and signed by Hunt and the appellant. The terms thereof are as follows:

I, John Linn Hunt, of Davuilevu, Rewa, planter, hereby acknowledge that I have this day agreed to sell to G. F. Grahame, of Suva, solicitor, all those pieces of freehold land containing an area of 446 acres and 33 perches situated in the district of Toga island of Vitilevu for the sum of £4,000 (four thousand pounds), payable as follows:—£1,350, to be paid on the day on which the transfer of the said lands to me by the executors of H. G. N. Carr, deceased, is signed; £2,650 to be paid on the date on which it becomes payable by me to the executors of the estate of H. G. N. Carr, deceased, in terms of the mortgage for that amount which I am giving to the said executors, with interest at the rate payable by me to the said executors, on the said £2,650 payable on the date provided for in the said mortgage and on the following terms and conditions: (1) The said G. F. Grahame shall employ me as his agent to subdivide and sell the said lands in blocks, areas and prices to be subject to his approval, at a remuneration being a commission of £10 per cent. on the purchase price of the blocks sold up to £7,000 and half the amount of the purchase prices in excess of £7,000. (2) The said commission shall be payable to me on the amount of, and as the principal moneys are received from purchasers by the said G. F. Grahame, that is to say, the instalments of commission shall be computed on the instalments of purchase money received by the said G. F. Grahame and shall be payable to me when such instalments are received by him. (3) Purchase terms shall be: one-fifth deposit; four-fifths by four equal annual instalments on the anniversary of the date of sale agreement; interest to be paid on balance due at 10 per cent. per annum, annually. Purchaser to pay costs of (a) agreement for sale; (b) survey; (c) all transfer and other legal fees. Balance of purchase money to be secured by lien over crops of sugar cane and rice on the land. (4) The said G. F. Grahame shall be entitled on payment of the full amounts due to me at any time to require from me a registrable transfer of the said lands free from mortgages or encumbrances to him or to such person or persons as he shall direct, in whole or parts.

J. L. HUNT.

Dated this 8th day of November, 1932.

I have agreed to purchase the above described lands for the price and on the terms and conditions above set out.

G. F. GRAHAME.

Dated this 8th day of November, 1932.

It is an undisputed fact that the appellant informed Ellis before he left for Sydney that he, the appellant, was going to finance Hunt to the extent of the amount which was to be paid in cash, viz., £1,350. The appellant alleged that he had told Ellis that he would make an advance to Hunt to the extent of £4,000 if necessary. This was denied by Ellis. The CHIEF JUSTICE held that whatever may have been said by the appellant to Ellis, the appellant did not disclose to Ellis the extent to which he was interested in the transaction as shown by the terms of the above-mentioned agreement. Their Lordships on the evidence see no reason to differ from that finding. As already stated, Ellis returned to the colony on Dec. 23, 1932. On Dec. 31 of that year the appellant left Fiji and did not return until Apr. 7, 1933. In the meantime, viz., on Mar. 15, 1933, the Vunivisi property, the subject of the lease, was conveyed to Hunt by the Carr trustees. The sum of £1,350 was paid by a cheque drawn by the appellant on his own account. It appears that before he went away from the colony on Dec. 31, 1932, the appellant placed in his private safe the cheque for £1,350 which was to be paid to the Carr trustees in the event of the transaction being completed in his absence. In the same safe he placed the document containing the above-mentioned agreement of Nov. 8, 1932, and a mortgage on the lease given by Hunt to the appellant to secure certain other advances made by the appellant to Hunt, which had been fully discharged before the agreement of Nov. 8, 1932, was signed. The key of this safe was given to the managing clerk of the firm of Ellis and Grahame. On the same day, viz., Mar. 15, 1933, Hunt executed the mortgage on the Vunivisi estate in favour of the Carr trustees for the sum of £2,650. Under the terms of the mortgage the payment of the said sum was due on Mar. 15, 1936, and the rate of interest was 6½ per centum per annum payable in quarterly rests. It was provided by the twelfth clause that the mortgagor should be entitled on any of the days thereinbefore appointed for payment of interest to pay off the whole of the principal sum or any part thereof not being less than £200 upon giving to the mortgagees three months prior notice in writing of his intention so to do, and the amount intended to be paid off.

On Apr. 30, 1933, the partnership between Ellis and the appellant was dissolved. It appears from a letter dated Aug. 12, 1933, from the appellant to Ellis that the amount due on the mortgage was at that time reduced to the extent of £650 and that the Carr trustees discharged the mortgage in respect of seventy-six acres of the Vunivisi estate. The

amount remaining due on the mortgage therefore was £2,000. The second part of the case against the appellant relates to the Vollmer estate. It appears that on Dec. 22, 1931, the Public Trustee of Fiji was appointed by the court as custodian trustee of the estate of J. H. F. Vollmer, deceased, and the appellant was appointed managing trustee of the said estate.

On Sept. 6, 1933, the appellant sent a letter in the following terms to Ellis :—

I am instructed by Mr. J. L. Hunt that it is his intention to pay off the whole of the principal sum, viz., £2,000, secured by his mortgage No. 3943, on Dec. 15, 1933, on which date the amount will be paid and a transfer of the mortgage submitted for execution by the executors.—G. F. GRAHAME.

On Dec. 15, 1933, the appellant drew his own cheque for £2,036 14s., paid it into what he called his "trust account," and on the same day he drew a cheque on the said trust account for the said amount and paid it to Ellis. On Dec. 18, 1933, the mortgage was transferred to the appellant as managing trustee for the Vollmer estate. On Jan. 8, 1934, an agreement in writing was made between Hunt and the appellant, as managing trustee of the Vollmer estate, whereby the terms of the mortgage were varied in the following respects.

(1) The rate of interest shall be £5 10s. (five pounds ten shillings) per centum per annum in lieu of the £6 10s. per centum per annum provided in the second covenant of the mortgage.

(2) "The mortgagor shall have the right to pay off at any time without giving any prior notice to the mortgagee of his intention so to do the whole of the principal sum or any part thereof not being less than £100" shall be substituted for the twelfth clause of the mortgage.

The transfer of the mortgage to the appellant was registered on Jan. 9, 1934, and the agreement as to the variations of the mortgage was registered on Feb. 12, 1934. It is admitted that the appellant used the funds of the Vollmer estate to repay himself the amount which he had advanced on Dec. 15, 1933, for the purpose of obtaining the transfer of the mortgage, and that when he gave the notice on Sept. 6, 1933, he intended to use the Vollmer trust funds to provide the necessary sums to make the payment. It is also admitted that the appellant did not at any time disclose to the Public Trustee his interest in the transaction. It is not necessary to state the details of this matter ; it is sufficient to say that some of the money used by the appellant to repay himself was lying to the credit of the Vollmer estate's current account with the Bank of New Zealand, and another sum was withdrawn by the appellant from the Government Saving's Bank as managing trustee of the Vollmer estate.

On Sept. 29, 1934, Ellis having obtained certain information had an interview with the appellant and on behalf of the Carr trustees he demanded from Hunt and the appellant all moneys received in excess of £4,000 and a transfer to his clients of the Vunivisi estate. The appellant, after the above-mentioned interview communicated his position by cable to Sydney for counsel's opinion, and he was advised by cable on Oct. 4, 1934, to settle. The result of that advice was that on the same day the appellant and Hunt gave to the Carr trustees the following undertakings.

In consideration of your refraining for a period of fourteen days from this date from issuing a writ against me in respect of the property known as Koronivia or Vunivisi I agree and undertake forthwith :—

(1) To procure the transfer by J. L. Hunt to you of the balance of the lands in Certificate of Titles 42/4140, 47/4604, X1/05/241 now still registered in his name.

(2) To procure the transfer by J. L. Hunt to you of all agreements for sale and purchase or other contracts in respect of sales or portions of the lands in the said titles.

(3) To procure the transfer by J. L. Hunt to you of all easements and other documents in his name or held by him or by me in respect of the whole or any portion of the lands comprised in the said lands.

(4) To give you a full account of all money received by me or by J. L. Hunt in respect of (1) sales of any portions of the said lands and (2) interest on balance of purchase money and (3) rents.

(5) To pay to you the whole of the money mentioned in paragraph 4 upon you repaying to me £4,000, the purchase money paid for the transfer of the said titles 4140, 4604, X1/05/241 to J. L. Hunt and £45 money expended on making drains on the said lands and £290 2s. 9d. interest on the said sum of £4,000.

(6) To deliver to you all survey plans and copies thereof in the possession of J. L. Hunt or myself in respect of the said lands or any portion thereof.

(7) To give you a complete account of all moneys paid for surveys in respect of the said lands and received by J. L. Hunt or myself from purchasers, and to pay to you the excess (if any) of amounts received over amounts paid—you to pay to me the amount (if any) of survey fees expended over and above the amount received from purchasers.

(8) To pay all stamp duty, registration fees and other outgoings in respect of the transfers mentioned in paragraphs 1, 2 and 3.

(9) To hand to you all documents relating to subdivisions of the said lands and to sales to purchasers.

(10) Now and whenever hereafter required by you to allow you access to and give you copies of any documents, correspondence or information in the possession of myself on behalf of myself or J. L. Hunt relating to the said lands and sales to purchasers or intending purchasers.

(11) To pay you 150 guineas for your solicitor's costs in this matter.

It is understood that upon performances by me of the above agreements and undertaking you will waive and abandon all other or further claims (if any) by you against me in respect of the said transfer of the said lands by you to J. L. Hunt.

G. F. GRAHAME.

In consideration of your refraining for a period of fourteen days from issuing a writ against me in respect of the property known as "Vunivisi," I agree for my part to execute the transfers referred to in paragraphs 1, 2 and 3 above, and to carry out the undertakings in which I am concerned in paragraphs 1 to 4, 6, 7, 9, 10.

J. L. HUNT.

The above-mentioned undertakings have been carried out.

It appears that on Oct. 23, 1934, the Public Trustee obtained an order from the court permitting him to engage the services of a solicitor and counsel to represent the Public Trustee and to investigate the trust funds in the hands of the appellant as managing trustee of the Vollmer estate and to take such proceedings as may be necessary. In pursuance of that order Mr. Robert Crompton was employed by the Public Trustee. Mr. Crompton, having inspected the books of the estate and made such searches as he deemed necessary, made a report on Oct. 25, 1934. This report was made an exhibit to an affidavit sworn by the Public Trustee, and was used at the hearing, although Mr. Crompton was not called as a witness and the appellant had no opportunity of cross-examining Mr. Crompton. Indeed, Mr. Crompton appeared as advocate for the Public Trustee and cross-examined the appellant. This is not a procedure which commends itself to their Lordships, but they say no more about it, for in their opinion the relevant facts of this part of the case are sufficiently proved without reference to Mr. Crompton's report. It appears that on Nov. 8, 1934, the appellant instituted an action against the Carr trustees to set aside the settlement contained in the document hereinbefore referred to, and an application was made to the court to postpone the proceedings instituted by the Attorney-General pending the trial of the action. This application for postponement was refused.

The CHIEF JUSTICE in his judgment of Nov. 27, 1934, held that the appellant was the real purchaser of the Vunivisi estate from the Carr trustees, that he made the purchase without disclosing to the Carr trustees that he was in fact the purchaser, and at a time when he was a member of the firm of Ellis and Grahame who were acting as solicitors for the Carr trustees; that the appellant knew full well that it would be to the benefit of the Carr trustees that Hunt's option should lapse and that the trustees should reap the benefit of the enhanced value of the property, that the appellant saw an opportunity to make personal profit out of the transaction and so far forgot his duty to his clients, the Carr trustees, as to place himself in a position which was wholly wrong from a professional point of view.

As to the second part of the case the CHIEF JUSTICE held that the dealings with the Vollmer trust funds were for his own account and especially the variation of the mortgage was made for his own benefit

and to the detriment of the *cestui que trust*. He drew attention to the fact that the *cestui que trust*, Mrs. Vollmer, is a native Fijian and the other beneficiaries are half-castes. The CHIEF JUSTICE adopted *mutatis mutandis*, the definition of professional misconduct as set out in *Re A Solicitor, Ex p. Law Society* (1) as follows :

If it is shown that a solicitor in the pursuit of his profession has done something with regard to it which would be reasonably regarded as disgraceful or dishonourable by his professional brethren of good repute and competency, then it is open to say that he is guilty of professional misconduct.

The final conclusion of the CHIEF JUSTICE was that he acquitted the appellant of fraud, but held that the appellant had been guilty of what he termed very grave and serious forgetfulness of the duty the appellant owed to his clients concerned in the above-mentioned transactions, namely, the Carr trustees, the Vollmer beneficiaries, and also the duty he owed to his partner Ellis ; and the CHIEF JUSTICE made the order of suspension already referred to.

Their Lordships are of opinion that the above-mentioned transactions, which form the two parts of this case, should be dealt with separately. They have no connection with each other, except accidentally, and different considerations arise with regard to them.

As to the first transaction, there is no doubt that Hunt had the option to purchase the Vunivisi property at any time during the term of the lease—and at a fixed price, viz., £4,000. Their Lordships accept the evidence that in the autumn of 1932, Hunt was anxious to exercise the option and that the proposal that the appellant should provide finance to enable the option to be exercised came from Hunt. It is clear that it would have been for the benefit of the beneficiaries of the Carr estate if Hunt's option had been allowed to lapse, as the property had improved considerably in value during the existence of the lease, and if it could have been shown that the appellant had instigated Hunt to exercise the option and had offered to provide the necessary finance, different considerations might have arisen, as to which their Lordships express no opinion. They are satisfied, however, that that was not the fact, and that the intention to exercise the option, as already stated, originated with Hunt, and that he solicited the assistance of the appellant to enable him to carry out his intention. The appellant was Hunt's solicitor, who had advanced moneys to Hunt on previous occasions, and it was only natural that Hunt should consult the appellant with a view to obtain his financial assistance for the purpose of exercising the option. The option was, in fact, exercised on Nov. 2, 1932, and from that time the only question was as to the manner in which the necessary finance was to be arranged.

In these circumstances the question arises was there any duty on the part of the appellant to the Carr trustees to abstain from assisting

his client Hunt to complete the purchase, to which he had become entitled by the exercise of the option on Nov. 2, 1932? Their Lordships are of opinion there was no such duty. It is true that the appellant was a member of the firm of Ellis and Grahame, who acted as solicitors for the Carr trustees, but on the view of the facts, which their Lordships have taken, Hunt of his own initiative had exercised his right of option on Nov. 2, 1932, and as far as the Carr trustees were concerned there was nothing to be done except to see that the matter was duly completed and the purchase money paid, or secured.

That being so, their Lordships do not take the view adopted by the CHIEF JUSTICE, namely, that the appellant was the real purchaser; in their opinion Hunt was the purchaser, and although they cannot regard the course which the appellant took with approval, they are not able to hold that there was any breach of duty on the part of the appellant towards the Carr trustees in agreeing to purchase the property from Hunt. Their Lordships take this opportunity of saying that in their opinion it is most desirable that a solicitor, acting for a client in any transaction, should not have a personal interest in that transaction without making full disclosure of the nature and extent of that interest to the client. Their Lordships have not allowed the fact of the settlement made in Oct., 1934, to affect their judgment. The settlement was made upon a cabled statement of the facts and upon a cabled reply from counsel in Sydney. It must obviously have been difficult to obtain a satisfactory legal opinion in that way upon such a matter as the present, and the exact terms of the case and of the opinion were not before their Lordships. Their Lordships therefore are of opinion that the appellant, in respect of the first part of this case, was not guilty of professional misconduct.

With regard to the second part of the case, viz., that which relates to the Vollmer estate, it was not disputed at the hearing before their Lordships that in using the funds of the Vollmer estate in the manner already stated, the appellant was, in fact, lending trust money to himself, and that he thereby committed a serious breach of trust. That, in itself, is not necessarily sufficient to constitute professional misconduct, and the question therefore whether the appellant was guilty of professional misconduct in regard to this part of the case remains to be considered. It was not suggested that the mortgage, which was transferred to the appellant as trustee for the Vollmer estate, was not sufficient security for the £2,000 and interest at $6\frac{1}{2}$ per cent. per annum. But assuming that it was not improper for the appellant to lend the trust funds on the security of the mortgage, their Lordships are wholly at a loss to find any justification for the alteration in the terms of the mortgage which the appellant made in agreement with Hunt. Why the appellant should have agreed that the beneficiaries, for whom he was trustee, should be

paid only $5\frac{1}{2}$ per centum interest, when the mortgagor was liable under the mortgage which was transferred to pay $6\frac{1}{2}$ per centum, has not been explained in any way satisfactory to their Lordships. This is a serious matter, especially having regard to the opinion of the CHIEF JUSTICE, who would know the conditions existing in the colony, that $5\frac{1}{2}$ per centum was a low rate of interest.

The other alteration in the terms of the mortgage by which the mortgagor was given the right to pay off at any time without any prior notice to the mortgagee the whole of the principal sum or any part thereof not being less than £100 can only have been made in order to facilitate the transactions which the appellant and Hunt had agreed to carry out, namely, the sale of the Vunivisi property in blocks and areas to be approved by the appellant. At the time when the alteration in the mortgage was made by the appellant and Hunt, the appellant was in effect the owner of the Vunivisi property and Hunt was acting as his agent in negotiating sales of parts of the property, and no doubt it was anticipated that the appellant would make a considerable profit out of such sales and that Hunt would be enabled to earn in respect thereof the commission specified in the agreement of Nov. 8, 1932.

These matters, in their Lordships' opinion, inevitably lead to one conclusion, namely, that the appellant was considering the interests of himself in preference to and to the detriment of the interests of the beneficiaries of the Vollmer estate for whom he was trustee. The definition of professional misconduct adopted by the CHIEF JUSTICE, to which reference has already been made, was accepted by learned counsel on both sides at the hearing before their Lordships. Applying the test therein contained, the question arises whether the appellant in the above-mentioned transactions relating to the Vollmer estate did something which would reasonably be regarded as disgraceful or dishonourable by his professional brethren of good repute and competency. To that question their Lordships are of opinion there can be only one answer, namely, that solicitors of good repute and competency would undoubtedly condemn the appellant's conduct in this respect as disgraceful and dishonourable. Their Lordships therefore are of opinion that on this part of the case the conclusion of the CHIEF JUSTICE was correct, and that the appellant was guilty of professional misconduct.

Their Lordships have already referred to the fact that one of the beneficiaries of the Vollmer estate is a native Fijian and that the others are half-castes, and they cannot emphasise too strongly the importance of the high standard of duty which is required from a solicitor to his client being maintained without any diminution when a solicitor is dealing with clients who happen to be natives or half-castes, who, as the CHIEF JUSTICE pointed out, may be ignorant and wholly illiterate people. Although their Lordships have dissented from the conclusion

of the CHIEF JUSTICE on the first part of this case, their finding that the appellant has been guilty of professional misconduct as regards the second part, must result in the appeal being dismissed with costs, and their Lordships will humbly advise His Majesty accordingly.

Solicitors : *Kimbers, Williams, Sweetland & Stinson* (for the appellant); *Burchells* (for the respondent).

[*Reported by S. P. KHAMBATTA, Esq., Barrister-at-Law.*]

OLIVER v. DICKIN.

[CHANCERY DIVISION (Bennett, J.), June 9, 10, 11, 12, July 2, 1936.]

*Copyright—Pleading—Infringement—Reproduction of substantial parts of work infringed**Injunction—Defence—Offer of undertaking with denial of liability.*

(i) In an action arising out of an alleged infringement of copyright the plaintiff, after setting out the literary works in which he claimed the copyright, pleaded that "the defendant has authorised the reproduction of the said works." At the hearing the plaintiff proceeded to prove that the defendant had reproduced such substantial parts of the said works as to amount to an illegal act. The defendant objected that if that was the plaintiff's case it ought to have been plainly so stated in the pleadings and the defendant was thereby embarrassed:—

HELD: the pleading was sufficient in law but was undesirable in such a case.

(ii) The defendant in her defence, while denying liability, offered an undertaking not to repeat the reproduction of copyright matter, referring particularly to one passage, to deliver up all copies and to pay costs and to submit to an order in these terms:—

HELD: the plaintiff could disregard such offer and proceed with the action in a case where liability was denied and extensive infringement had been proved.

[EDITORIAL NOTE.] The questions here debated are purely matters of practice. The first point is how far infringement must be particularly pleaded in a statement of claim. The second is a general point in all actions for an injunction and is whether by offering in his defence, an undertaking and submission to an order the defendant can force the plaintiff to go on at his peril. The decision in the present case is that the undertaking was narrower in its terms than that to which the plaintiff proved himself entitled, and therefore he was entitled to go on.

AS TO POINTS RAISED, see HALSBURY, Hailsham Edn., Vol. 7, pp. 586, 587, para. 909 and p. 588, para. 913; and FOR CASES, see DIGEST, Vol. 13, p. 225, Nos. 649-652 and Vol. 28, p. 411, Nos. 363-365.]

Cases referred to:

- (1) *Ash v. Hutchinson & Co. (Publishers), Ltd.* (1936), 52 T.L.R. 429.
- (2) *Winkle & Co., Ltd. v. Gent & Son* (1914), 31 R.P.C. 473; 28 Digest 411, 365.

ACTION for an injunction and damages in respect of an alleged infringement of the plaintiff's copyright. The plaintiff, Edmund Giffard Oliver, was the author of certain literary works concerning the mastiff published respectively in the "Old English Mastiff Club Year Book, 1929," in the "Kennel Gazette" newspaper of Nov., 1930, Oct., 1931, June, 1933, Jan. and Feb., 1935, and in "Hutchinson's Popular Dog Encyclopædia." The defendant, Norah Dickin, was the author of a work entitled "The Mastiff, its History, Description and Standard." By the statement of claim it was pleaded:

All copies of the defendant's work are infringing copies of the plaintiff's said works and . . . the defendant has authorised the reproduction of the said works.

The plaintiff alleged infringement of his copyright and conversion whereby he had suffered damage. The defendant admitted copying a translation of a story from Plutarch and offered an undertaking not again to reproduce the said passage or any other passage or passages from the plaintiff's work or in any manner infringe the copyright therein, to deliver up copies and to pay costs.

At the hearing the plaintiff proceeded to prove that the defendant had reproduced such substantial parts of the said works as to amount to an illegal act and that they entitled the plaintiff to relief. The case is reported solely on the question of the sufficiency of the plaintiff's pleading and the effect of the offer of such an undertaking.

Tristram Beresford, K.C., and *K. E. Shelley* for the plaintiff.

Kenneth R. Swan, K.C., and *E. J. Macgillivray* for the defendant.

BENNETT, J. : [His Lordship stated the facts and found an infringement of the plaintiff's copyright by reproducing or authorising the reproduction in chap. 1 of the defendant's book of a substantial part of the plaintiff's article published in the "Kennel Gazette" for Jan. and Feb., 1935.] The next question is whether those facts, having been proved, the plaintiff can succeed upon his present pleading. The argument was that the plaintiff has proved a wholly different case from the case he pleaded, that he has refused to apply for leave to amend and that on the pleadings he must fail. The action first came on for trial before FARWELL, J., on May 6, 1936. On that occasion, either at the conclusion or in the course of the opening speech of Mr. Tristram Beresford, for the plaintiff, Mr. Swan, for the defendant, objected that the plaintiff was not entitled to develop his case on the lines on which it was being opened. I have been furnished with a transcript of the shorthand note of what was said on this point on that occasion. On p. 3 of the transcript, after he had read the Copyright Act, 1911, s. 2, Mr. Swan is reported as follows :

Your Lordship sees the words "to produce or reproduce the work or any substantial part thereof in any material form whatsoever." Your Lordship will observe that there are two alternative offences indicated in that section, one is to produce or reproduce the work, the other is to produce or reproduce any substantial part of the work.

Then the reasons follow. On p. 9 of the transcript, after some argument by Mr. Beresford, FARWELL, J., is reported as having said :

As I understand Mr. Swan's point, there is a good deal of substance in it. In your statement of claim as it stands, whether amended or not, the case you are making out is that the defendant has infringed the copyright in the works in question and been reproducing those works. If that is the case you have pleaded, it is not, on your opening, the case you are seeking to make. You are seeking to make the case that the defendant has reproduced such substantial parts of the plaintiff's

works as to amount to an illegal act and that they entitle the plaintiff to relief. Mr. Swan is saying, if you desire to make that case then you have to state in your pleading what it is on which you rely to make out that case. That is the substance of the objection as I understand Mr. Swan's argument.

Then there is some further discussion at p. 14 of the transcript, and after that discussion FARWELL, J., says this :

I think it is a question of very considerable difficulty, whether this pleading of yours [Mr. Beresford's] is sufficient or not, but when I have responsible counsel such as Mr. Swan telling me that the nature of the pleading of the plaintiff has embarrassed him—I am not saying it in any offensive sense—and put him into a position of embarrassment because he has not had an opportunity of considering what defences there may be open to the defendant under certain circumstances, I hesitate very much to force the defendant to go on without giving him an opportunity of knowing exactly what the case is he has to meet and having an opportunity of seeing whether he can meet them. That is my difficulty. It may be that strictly speaking—I am not deciding this one way or the other for the moment—that your allegation that the defendant has infringed the plaintiff's work is an allegation that he has infringed it by taking substantial parts of those works. It may be so. I am not saying necessarily it is not, but it is open to the other construction, and being open to the other construction, and being told by responsible counsel that that is the construction he has put upon it, that he is in a condition of embarrassment, I am very loath to force him to go on without giving him an opportunity, at any rate, of ascertaining exactly what the case is he has to meet.

Upon that, after having been told that there was a decision in the Court of Appeal which justified the form of pleading which was not then reported, FARWELL, J., adjourned the hearing. It is quite clear, in my judgment, that FARWELL, J., did not decide the point at all that has been raised by the defendant, and since the matter was before FARWELL, J., the case which was relied upon by the plaintiff as justifying the form in which he pleaded (*Ash v. Hutchinson* (1)), is now reported. That is a decision of the Court of Appeal. The plaintiffs in that case were suing two companies as defendants, the first company being the publishers and the other company, the printers of a book in which the plaintiffs alleged there had been an infringement of their copyright. The statement of claim in that case was pleaded in this way. There were two plaintiffs, Ash and Courtauld.

The plaintiff, Mr. Edward Cecil Ash, was the author, and from June 7, 1934, the owner, of the copyright in a book called "The Practical Dog Book." The plaintiff Mrs. Constance Cicely Courtauld, was the legal owner of the copyright in that book from Apr. 25, 1932, until June 7, 1934, during which period Mr. Ash was beneficially entitled thereto. A book called "The Dog" (of which one James Dickie was the author) was published by the defendants Hutchinson & Co. (Publishers), Ltd., and printed by the defendants William Brendon & Son, Ltd. The plaintiffs alleged that the defendants printed and published "The Dog" in or about Aug., 1933, and that all copies thereof were infringements of the plaintiffs' copyright in "The Practical Dog Book." They alleged that the defendants and each of them by such printing and publishing in or about Aug., 1933, had infringed their copyright and had been guilty of conversion—

a form of pleading which is substantially the same as the pleading of the plaintiff in the present case. Upon that pleading in *Ash v. Hutchinson* (1), GREENE, L.J., on p. 434, is reported as follows :

The claim against the printers is based on the allegation that they were the "printers" of the offending work which was printed "in or about Aug., 1933." This allegation sufficiently states that the printers reproduced the plaintiff's work or some substantial part thereof in a material form.

I cannot decide in favour of the defendant's argument without disregarding the view of GREENE, L.J., and, if I may respectfully say so, I entirely share that view upon the consideration of the language of the Copyright Act, 1911, ss. 1 (2) and 2 (1), and of the definition of infringement contained in sect. 36 of that Act. At the same time, I am sure that if the plaintiff's real case is that the defendant has infringed by taking substantial parts of his work, it is undesirable to plead the plaintiff's case as has been done in the present case. The defendant is not informed as she ought to have been of the facts upon which the plaintiff relies. To plead the plaintiff's case as was done in the present case may frequently lead to the defendant being, as she was in the present case, embarrassed by the pleading and to delay and expense as a consequence. In my judgment, the point taken by way of defence fails.

There remains the point taken upon the defendant's offer to give an undertaking contained in her defence thus :

While denying liability this defendant is prepared in satisfaction of the plaintiff's claim under paras. 1 and 3 of the prayer to give an undertaking not again to reproduce the said passage [that is the translation of the story from Plutarch] or any other passage or passages from the plaintiff's said works or in any manner infringe the copyright therein and to extract from any copies of her work in her possession or control the said passage and deliver the same up to the plaintiff and to submit to an order giving effect to this offer and to pay the plaintiff's costs up to Mar. 28, 1936, and the costs of such order and of carrying it into effect.

It was argued that I am bound by the decision of the Court of Appeal in *Winkle & Co. v. Gent & Son* (2), to decide in favour of the defendant's contention. If the Court of Appeal had laid down a general rule of practice or stated some principle within which this case falls, I should, of course, be bound by the decision and would follow it. But I cannot find in the report any statement of a rule or of a principle. It seems to me that in every case where a defendant has made an offer to give an undertaking in an action where an injunction is being sought, the question to ask one's self is whether in all the circumstances, including the terms of the offer, it is unreasonable on the part of the plaintiff to refuse the offer and go on with his action. If the answer to that question is in the affirmative, then it seems to me reasonable that he should pay the costs incurred subsequent to the offer. I think in the present case the offer may be interpreted as meaning this : I have taken

your translation of the story from Plutarch, I deny that in doing that I have committed a wrong, but it may be that in that respect I have, and therefore I will extract that story from my book and give an undertaking not to infringe. If the use of the story from Plutarch had been the only use made by the defendant of the plaintiff's article, I think it would have been unreasonable on the part of the plaintiff, in all the circumstances, not to have accepted the offer. But, having regard to the extensive use that has been proved, it was, in my judgment, quite reasonable for him to go on. The defendant might hereafter again have made use of the plaintiff's work and it would have been inconvenient to have tried the question litigated in this action on a motion for committal for contempt, inconvenient both to the court and to the plaintiff.

My conclusion is that in the circumstances it was not unreasonable for the plaintiff to go on with his action after the delivery of the defence, for the purposes of establishing his case. The result is that this point also fails.

Solicitors : *Sutton, Ommanney & Oliver* (for the plaintiff) ; *Few & Co.* (for the defendant).

[*Reported by* REGINALD TOWNSEND, ESQ., *Barrister-at-Law.*]

JOHANN PLISCHKE & SOHNE G.m.b.H. v. ALLISON
BROTHERS, LTD.

[KING'S BENCH DIVISION (Branson, J.), July 1, 1936.]

Carriers—Stoppage in transitu—"Free house, London"—Termination of transit.

Napier Bros. having ordered goods from the plaintiffs these were dispatched from Hamburg to London by steamer. According to the confirmation of the order the terms of the contract were "Free house, London." The goods arrived in London and the defendants, the carriers, were instructed by Napier Bros. on Jan. 14 to warehouse them at the dock. On Jan. 18 Napier Bros. executed a deed of arrangement with their creditors. It was contended that by the terms of the contract the transit did not end until the goods reached the warehouse of Napier Bros., and that therefore a stoppage *in transitu* on Jan. 18 was in order :—

HELD : the transit terminated as soon as the carriers warehoused the goods on behalf of Napier Bros., and the words "Free house, London," did not necessarily mean that the goods were in transit until they reached the premises of Napier Bros. in London.

[EDITORIAL NOTE.] It is well settled that as soon as a carrier holds goods as the agent of the buyer the transit is terminated and the right to stop *in transitu* ceases. The point discussed here is whether this proposition has to be modified when the contract of sale contains the terms "Free house, London," i.e., that charges will be paid upon the goods until delivered at the buyer's premises in London. From this it was argued that the transit continued until delivered at the buyer's premises; but this was held not to be so in a case where the buyer ordered the goods to be warehoused at the dock for his own convenience. The transit then terminated when the buyer gave instructions for the goods to be warehoused, the carrier then becoming the buyer's agent.

AS TO TERMINATION OF TRANSIT, see HALSBURY, Hailsham Edn., Vol. 4, pp. 96, 97, para. 139; and FOR CASES, see DIGEST, Vol. 39, pp. 620-623, Nos. 2178-2200.]

ACTION by plaintiffs, a Czechoslovakian firm, against the defendants, a firm of shipping and forwarding agents, for the return of four cases of linen goods or their value, and for damages for detention. Alternatively, they claimed damages for being deprived of the goods.

The plaintiffs urged that the goods were despatched from Hamburg for delivery to Messrs. Napier Bros., of London, now insolvent, and that whilst in transit the goods came into the possession of the defendants in London. Instructions by telegram were sent on Jan. 18, 1935, to the defendants not to deliver the goods to Messrs. Napier Bros., and plaintiffs on Aug. 13, 1935, demanded the delivery of the goods to their agents.

Defendants failed to deliver the goods as required, and denied that the plaintiffs were the owners of the goods. They alleged that they had received the goods on Jan. 14, 1935, for Napier Bros., and still so held them. Although they had received a telegram on Jan. 18, 1935, the property in the goods had passed to Napier Bros. before the telegram was despatched and the goods were then held by the defendants as agents for Napier Bros.

C. N. Tindale Davis for the plaintiffs.

A. E. Woodgate for the defendants.

Tindale Davis : The goods were shipped "Free house, London." The transit did not come to an end when the goods were put into warehouse. They were there awaiting instructions. Until instructions were received transit remained.

Woodgate : The property in the goods passed when they were packed and appropriated to Napier Bros. The contract was "Free house, London," and the warehouse answered that description.

BRANSON, J. : This is a case in which the plaintiffs were the vendors of certain linen goods. They sue the defendants in detinue for detention of the goods or for damages for detention.

The action arises in the following way. In Sept., 1934, the plaintiffs, who are manufacturers of linen goods, accepted an order placed by a firm, Napier Bros., for a quantity of hemstitched linen goods, and, according to the confirmation of the order, the terms were "Free house, London, exclusive of 90 days' acceptance," and in pursuance of that contract the plaintiffs shipped the goods through Karl Prior, of Hamburg, on the steamer "Awk" to Allison Bros., London. The "Awk" arrived on Jan. 14, 1935. According to the evidence which has been given by the shipping clerk of the defendants and the accountant of the firm of Napiers, Napiers instructed Allisons to warehouse these goods and to hold them pending further instructions. On Jan. 14, or within a few days of it, Napiers found themselves so embarrassed financially that they called a meeting of their creditors and executed a deed of arrangement. As soon as this got to the knowledge of the plaintiffs, they cabled to Prior, of Hamburg, to prevent delivery, and Prior on the same day cabled the defendants not to deliver.

The question arises whether the plaintiff has succeeded in exercising the unpaid vendor's right of stopping goods *in transitu*. That is the real issue in this case. It has been strenuously argued by Mr. Davis for the plaintiffs that the *transitus* of these goods did not end until they were delivered, not at any warehouse or other place in London, but at the premises of Messrs. Napiers; and he says the goods were never delivered and consequently the *transitus* was not concluded when on Jan. 18 the order to stop delivery was given and received.

In the first place the question turns on what was the meaning of the contract, and it is urged that the term "Free house, London," indicates that the goods have to be delivered at the named place which was the premises of Messrs. Napiers. But I think that all that means is that the buyer has a right to demand that the property shall be delivered to him, and that it does not exclude the ordinary right of the purchaser to indicate that they should be delivered to some other place than his own

private premises ; and I cannot construe this contract as meaning that the transit cannot come to an end unless the goods are delivered at Messrs. Napiers. If it means that Napiers were prepared to take delivery at any antecedent stop in the *transitus*, there is no reason in law or in common-sense why they should not be able to say "leave them in the Regent's Canal Dock and we will take delivery of them there." What happened, there is no doubt, is that before the ship arrived, Allisons, who had acted as forwarding agents, inquired of Napiers where they wanted the goods delivered, and Napiers said :

Put them into the warehouse of the Regent's Canal Dock and leave them there for further instructions.

It is quite plain that Allisons had no authority as agents for the sellers to put them in dock, and it is obvious that they must have done so as agents for the purchasers. The moment these goods, having been landed in the ordinary course and put in the warehouse pending payment of the duty, the goods have come into the hands of Napiers' agents, the *transitus* has ended, and that is the end of the matter. It is said by Mr. Davis that *transitus* cannot finish until the duty has been paid and the goods properly received into this country. That would be true if Napiers were still insisting upon the delivery of the goods at 12, Wilson Street. But it is not true if Napiers are prepared to say, "we do not want these goods except where they are now."

I think on the true view of this case that the *transitus* finished when the goods were collected from the steamer by Allisons. The *transitus* ended by the end of Jan. 14, or at all events long before Jan. 18. That decides this case in my view. But even if I am wrong on this point, the Sale of Goods Act, 1893, s. 45 (2), dealing with the question of stoppage *in transitu* which enacts :

If the buyer or his agent in that behalf obtains delivery of the goods before their arrival at the appointed destination, the transit is at an end

operates to put an end to this transit when the goods were being held by Allisons as agents for Napiers. Some question has been raised as to the correctness of the argument that Allisons were acting as agents for Napiers in this matter. This is, however, quite consistent with the letters they wrote at the time.

It seems to me that the plaintiffs must fail in this action, and I give judgment for the defendants with costs.

Solicitors : F. P. Woodcock, Bennett & Co. (for the plaintiffs) ; Burnie & Coleman (for the defendants).

[Reported by FRANK ROWE, ESQ., Barrister-at-Law.]

NATIONAL CARBONISING CO., LTD. v. BRITISH COAL DISTILLATION, LTD.

[COURT OF APPEAL (Slessor and Romer, L.J.J., and Eve, J.), **June 18, 19, July 7, 1936.**]

Patent—Licence—Covenant by licensee to communicate improvements—Assignment of patent—Enforcement of covenant.

A patentee granted a licence, one term of which was that the licensee should communicate further improvements. A further improvement was made and patented. The patentee assigned his patents to the plaintiffs who commenced an action against the defendants, assignees of the licensee, and claimed a declaration that the defendants should communicate the improvements to them. The judge found in favour of the defendants. The plaintiffs appealed to the Court of Appeal:—

HELD: the patentee was entitled to assign the benefits due to him under the licence agreement.

EDITORIAL NOTE. A licensee of a patent is quite commonly expressly restricted from assigning his licence, and it has been held that a licence is not generally assignable; but no such restriction applies to the patentee, who is generally free to assign his rights as he pleases. The further question arises whether the assignee of the patent can enforce a clause in the licence whereby the licensee covenants to communicate all improvements in the patented article. Differing from the court below the Court of Appeal has held that the assignee of the patent is here entitled to receive such information.

AS TO RIGHTS OF ASSIGNEE OF PATENT, see HALSBURY, 1st Edn., Vol. 22, Patents, p. 187, para. 386; and FOR CASES, see DIGEST, Vol. 36, pp. 677, 678, Nos. 1579-1587.]

Cases referred to:

- (1) *Tolhurst v. Associated Portland Cement Manufacturers (1900), Ltd., Tolhurst v. Associated Portland Cement Manufacturers (1900), Ltd., & Imperial Portland Cement Co., Ltd.*, [1903] A.C. 414; 31 Digest 369, 5157.
- (2) *Jaeger's Sanitary Woollen System Co., Ltd. v. Walker & Sons* (1897), 77 L.T. 180; Digest Practice 794, 3569.
- (3) *Kemp v. Baerselman*, [1906] 2 K.B. 604; 12 Digest 589, 4908.
- (4) *British Waggon Co. v. Lea* (1880), 5 Q.B.D. 149; 12 Digest 589, 4911.
- (5) *New Ixion Tyre & Cycle Co. v. Spilsbury*, [1898] 2 Ch. 484; 36 Digest 675, 1566.
- (6) *Hassall v. Wright* (1870), L.R. 10 Eq. 509; 36 Digest 675, 1567.

APPEAL from a judgment given by CLAUSON, J., delivered on Feb. 11, 1936.

L. & N. Coal Distillation, Ltd., were the owners of certain letters patent and on July 28, 1931, they granted to Leicestershire (L. & N.) Coal Distillation, Ltd., a licence to use the patented inventions within a certain limited area. The licensees undertook to communicate certain further inventions in respect of the process to which the patents related and to permit the patentees to work such further inventions during the term of the licence. On May 30, 1932, the licensees obtained letters patent for an invention falling within the category of further inventions. The original patentees then went into liquidation, and on Mar. 24, 1933,

conveyed to the plaintiffs by deed the patents included in the licence of July 28, 1931. The licensees were also reconstructed and became the defendant company.

The plaintiffs commenced an action against the defendants and claimed a declaration that the defendants were bound to communicate to them the new inventions and to permit them to use and work such inventions during the existence of the licence. CLAUSON, J., held that on a proper construction of the licence agreement the action failed. The plaintiffs appealed.

H. B. Vaisey, K.C., and *G. H. Lloyd-Jacob* for the appellants.

R. F. Roxburgh, K.C., and *Geoffrey W. Tookey* for the respondents.

Vaisey, K.C.: The licence contract should be read as if the word "patentee" includes "his assigns." If the licence was intended by the parties to be assignable it does not matter that the words "and his assigns" do not appear in the licence: *Tolhurst v. Associated Portland Cement Manufacturers* (1). The clauses by which the licensee may in certain circumstances sue in the patentee's name would be meaningless unless "patentee" included an assignee. Therefore the licence contemplated assignment.

Roxburgh, K.C., called upon to answer that part of the case: A licence is *prima facie* unassignable; an assignee is not bound to fulfil the terms of a licence as positive covenants do not run. The words "and assigns" are not inserted in an executory contract if the effect might be to alter the burden. If the patentees were to assign to a trade rival the burden would be intolerable as the new invention which would have to be disclosed might not have been patented. Our obligation was to disclose any further invention to L. & N. Coal Distillation, Ltd., and that obligation was personal because the disclosure was to be to a person competent for the purpose. Furthermore, under the Patents and Designs Acts, s. 14 (1), the patentee may make assignments for any number of places, and so multiply the number of persons to whom disclosure has to be made. The agreement resembles a joint adventure or partnership agreement. The contract may be conceived of as divisible, part assigned, and part unassigned; there is still an obligation to disclose any further invention to L. & N. Coal Distillation, Ltd. [He referred to *Tolhurst v. Associated Portland Cement Manufacturers* (1); *British Waggon Co. v. Lea* (4); *Kemp v. Baerselman* (3).]

Tookey: The assignee of a patent, under which a licence has been granted, takes subject to the right of the licensee to use the patent. [He referred to *New Ixion Tyre & Cycle Co. v. Spilsbury* (5); and *Hassall v. Wright* (6).] Because the parties intended to provide for the patent being assigned, it does not follow that they intended to provide for the licence being assigned. The respondents are being required to issue a licence to a person quite different from that to whom they agreed to

grant one. They are not prepared to accept the benefit of an assignee's brain, when they are entitled to the benefit of the licensee's brain.

Vaisey, K.C.: The licence and the collateral terms are in the same document, and it is necessary to see what the parties intended. The document makes nonsense unless the term "patentee" includes his assignees. The appellants are bound by this document, but they are also entitled to all their rights under it. They cannot approbate and reprobate.

SLESSER, L.J.: In July, 1931, a company called L. & N. Coal Distillation, Ltd., were the registered legal owners of letters patent relating to the distillation of coal. On July 28, 1931, they granted a sole and exclusive licence to the Leicestershire (L. & N.) Coal Distillation, Ltd., now, by change of name, the defendants, the British Coal Distillation Ltd., to work the processes and apparatus within the counties of Leicester, Derby, Nottingham, Warwick, and Stafford. This licence was of a peculiar kind containing reciprocal obligations and rights between the patentee and the licensee. The consideration was stated to be the allotment and issue to the patentee or their nominees of certain deferred shares credited as fully paid up in the capital of the licensee, and, in addition, the right to use and work the inventions with full power to grant such licences within the named counties, the patentee was bound by clause 2 to communicate to the licensee any improvements in the inventions or any further invention which they might discover or become entitled to, and to give to the licensee full information and details for demonstrating the exact mode of using or working the same, without the payment of any further consideration except one-fourth of all royalties or cash payments which might be received by the licensee in respect of the use of the inventions, or any of them—this would include improvements and further inventions—in any district within the area controlled by the licensee other than the county of Leicester.

There followed in clause 3 a complementary obligation upon the licensee to communicate to the patentee their improvements or further inventions, and an obligation to permit the patentee to use and work the same during the continuance of the licence without payment of any further consideration other than one-fourth of royalties and cash payments payable to, or received by, the patentee in any district in Great Britain and Northern Ireland other than the named counties of the licensee. This covenant, by clause 11, would include all royalties or cash payments payable to, and received by, the licensee, whether under the original patent or improvements, or further inventions.

Clause 5, which deals with any action or proceeding for the revocation of the letters patent, puts an obligation upon each party to give the other notice in writing thereof, followed by an obligation to confer to consider

the necessity or expediency of defending any action and arrangements as to the costs and expenses, and indemnities, together with an express provision that the licensee may, where necessary, use the name of the patentee. A similar provision in clause 6 deals with infringement, or threatened infringement, of the letters patent, and, again, it is provided that in any contemplated action the licensee may, where necessary, use the name of the patentee. These provisions are here set out because in this case it is argued, there being no reference to assigns in the licence, that the licence was not assignable.

On Mar. 24, 1933, L. & N. Coal Distillation, Ltd., the patentees, being in liquidation, the liquidator purported to assign the patent rights to the plaintiffs, the National Carbonising Co., Ltd., including the inventions and letters patent, and all rights thereunder, and the benefits of the licences granted, one of which was the licence of July 28, 1931, from L. & N. to the Leicestershire (L. & N.) Coal Distillation, Ltd., now the defendants.

The statement of claim asks for a declaration that the plaintiffs are, and have at all material times, been entitled to receive, and the defendants bound to supply, full particulars of improvements or further inventions under clause 3 of the licence of July 28, 1931. The defendants admit that they are possessed of an invention which was a further invention within the meaning of clause 3 of the licence, and that they had applied for letters patent for it which had been granted, but, as I have said, they deny the assignability of the licence which, in fact, is the sole issue in this case.

It is clear, in the first place, that the absence of any express reference in the contract to assigns is not conclusive if the true view is that it was intended that the benefit of the contract should be assignable. In the words of the EARL OF HALSBURY, L.C., in *Tolhurst's* case (1), at p. 416 :

The word 'assigns' not being in the contract is immaterial if it is ascertained that the intention of the contract is that it should be assigned.

In my opinion such an intention is clearly expressed in the agreement for licence of July 28, 1931. The assignment of Mar. 24, 1933, is primarily an assignment of the inventions and letters patent and all rights therein, and the assignment to the purchaser is said to be absolutely subject to and with the benefit of the several licences which include the licence of July 28, 1931. So far as concerns the invention and the patent, there can be no doubt that patent rights, being a recognised species of property, can be transferred from the original patentee to any other person, and so far as the licence is onerous upon the patentee, the patentee, having divested himself of his rights to the extent of depriving himself from enforcing them under the patent against the licensee in respect of acts which fall within the terms of the licence, can only assign the benefits of the patent

under that limitation ; but here, under the licence agreement, the patentee receives benefits, for example, the right to have communicated to him improvements, or further inventions, made by the licensee under clause 3, and the right to use and work the same on the patentee paying to the licensee the sums stated in clause 11. These benefits enure to the patentee's rights, and in my view can properly be assigned along with the patent itself. It is further significant that it is expressly provided under clauses 5 and 6, where proceedings are necessary for the protection of the letters patent, or any of them, that the licensee may use the name of the patentee. If the argument of the respondents be right, and the licence is not assignable with the original patent, there would be no provision thereafter whereby the licensee could use the name of the assignee, and although a threat to the patent might injure the licensee, the licensee in such a case would be without a remedy, and some of the purposes of clauses 5 and 6 would be defeated, because thereby the licensee is given an interest in the maintenance of the patent rights, under whose licence he works, which may need protection.

It is argued for the licensee that there is here such dependence upon the mutual personal confidence or personal skill to be exercised by the respective parties to the licence as to prevent the inference arising that the parties intended to make their rights under the licence assignable. I am unable to find any such dependence. There is no obligation upon the licensee to make any improvements or further inventions, nor upon the patentee, but only a mutual obligation to communicate them if they are made, with respective permission to use and work and to pay. In this respect this case seems to me very distinguishable from such authorities as *Jaeger's* case (2), where it was held that the agreement required a certain degree of skill, knowledge, and supervision in its performance, and was therefore not assignable, or as the case of *Kemp v. Baerselman* (3), where the contract was with a specific manufacturer, held to be personal in nature, and unassignable.

The learned judge agrees that the effect of the assignment was to vest the original patents in the plaintiffs who were free by law to assign the letters patent subject to the rights of the licensee, but he comes to the view that there is constituted by the licence a sort of partnership in assets and profits. He bases his conclusion upon the view, among other matters, that it is implied that the patentee shall retain and work the patents. I can find no justification for this conclusion. Certainly there are no such words to be found to restrict the right of the patentee to assign, and to assume such power would, in my opinion, do violence to the general right of a patentee to dispose of his patent as he wills.

Finally, the learned judge relies upon a clause to which I have not referred (clause 16), to the effect that :

in the event of any order being made or any resolution being passed for the winding

up of the licensee, except a resolution for winding up with a view to reconstruction, then and in any such event the patentee may forthwith by notice to the licensee determine this licence.

He says that by this it is intended that if the licensee went into liquidation for reconstruction the patentee was to accept the reconstructed company as the *alter ego* of the licensee, and that the reconstructed company was then to step into the shoes of the licensee in every respect. In my view the exception to the power of the patentee, by notice, determining the licence in the event of the winding up of the licensee merely means that if the winding up be for the purposes of reconstruction the patentee cannot, under clause 16, determine the licence. But I do not agree that these words destroy the right of the patentee to assign, and, as for resolutions for winding up other than with a view to reconstruction, clause 16 merely gives a power to the patentee to determine the licence which, if he elects, he need not use. So that, even in that event, he is free to assign the patent, and his rights under the licence, if he thinks fit; certainly there is nothing in clause 16 to prevent him.

I think, therefore, that the learned judge was wrong in coming to a conclusion in favour of the respondents, and that the appellants are entitled to their first declaration, which is the only declaration they now claim. The appeal, therefore, will be allowed with costs, here and below.

ROMER, L.J.: The question to be determined on this appeal is whether in clause 3 of the licence of July 28, 1931, the word "patentee" is to be read as meaning the patentee and its assigns. In answering this question the authorities to which our attention has been drawn do not, I think, afford any assistance. For they lay down no general principle applicable to the case, except perhaps this — that a contract which involves the exercise of personal skill on one side or the other, or which is based upon the confidence that one party has in the other, is *prima facie* unassignable. In all cases the question whether the particular contract is assignable or not is merely one of construction. LORD MACNAGHTEN in the leading authority upon the subject said :

I cannot think that any legal principle is involved in this case. The case may be of great importance to the parties. From a legal point of view it is, I think, of no importance at all. The question, as it seems to me, depends simply and solely on the true meaning and effect of the contract.

That was said of the case of *Tolhurst v. Associated Portland Cement Manufacturers* (1) at p. 416, and can be said equally truly of the present one.

I therefore turn to the contract in the present case which is the licence of July 28, 1931. It is made between L. & N. Coal Distillation, Ltd., therein called "the patentee" of the one part and the defendants by their then name of the Leicestershire (L. & N.) Coal Distillation, Ltd., therein called

"the licensee" of the other part. The patentee was at that time engaged in a process for the distillation of solid carbonaceous material and was the registered owner of various letters patent, and had made applications for other letters patent relating to the said process. The licensee appears to have been desirous of exploiting the subject matter of the inventions and applications within the counties of Leicester, Derby, Nottingham, Warwick and Stafford; and by clause 1 the patentee accordingly granted to the licensee an exclusive licence to use and work all the said inventions within the said counties during the unexpired residue of the respective terms of the latter's patent and any extension and renewals thereof. The clause expressly authorised the licensee to grant sub-licences in consideration of the payment of royalties or for other consideration as thereafter mentioned. Part of the consideration for the licence was the allotment and issue to the patentee or its nominees of fully paid shares in the licensee.

So far as royalties were concerned it was provided (clause 7) that no royalty or other sum should be payable by the licensee to the patentee in respect of the use of the invention in the county of Leicester, but (clause 10) that the licensee shall pay the patentee one-fourth of all royalties and cash payments in lieu of royalties payable to and received by it in respect of the use of the said inventions in any of the other of the said counties, it being agreed (clause 8) that the royalty to be paid by any sub-licensees should be at the rate of 6*d.* per ton of raw material treated under the inventions though such royalty might from time to time be varied in such manner as the patentee and licensee should mutually determine. A corresponding obligation was imposed by clause 11 on the patentee to pay to the licensee one-fourth of all royalties and cash payments in lieu of royalties payable to and received by it in respect of the use of the inventions in any district within the area controlled by the patentee other than the five counties already mentioned. It would seem from the contract that neither the patentee nor the licensee intended themselves to work the inventions, but to exploit them within their respective territories by means of licences and sub-licences as the case might be.

Clause 5 provided that if at any time during the continuance of the licence any action or proceeding for the revocation of any of the said letters patent should come to the knowledge of either of the parties thereto, such party should forthwith give notice thereof to the other. In a certain event the licensee was to be at liberty to defend any such proceedings, and for that purpose the licensee might where necessary use the name of the patentee.

Clause 6 dealt with infringements or threatened infringements of any of the letters patent, and provided that in the event therein mentioned the licensee might take action to prevent such infringements, and for

that purpose the licensee might where necessary use the name of the patentee.

Clause 3, which is the important one for the present purpose, is in these words :

The licensee shall forthwith communicate to the patentee full particulars of any improvements in the said inventions or of any further invention which it may make discover or become entitled to in respect of the said process (whether such improvement or invention be patented or not) and (without expense to the patentee) shall give to the patentee or its proper officers full information and details thereof with all necessary plans drawings and designs for demonstrating the exact mode of using or working the same and will permit the patentee to use and work the same during the continuance of this licence without payment of any further consideration than is provided for by clause 11 hereof.

By clause 2 a corresponding obligation had been imposed upon the patentee in favour of the licensee.

Finally, clause 16 is in these terms :

In the event of any of the royalties or other sums payable under the provisions of this deed being in arrear and remaining unpaid for a period of twenty-one days after the same shall become payable as hereinbefore provided whether or not demand therefor shall have been made by the patentee or if the licensee shall have committed or knowingly permitted a breach of any other of the covenants hereinbefore contained and on its part to be performed and observed and shall in the case of any such breach capable of being made good have failed to make good the same within twenty-one days after the licensee shall have been served with notice by the patentee requiring the licensee to make good such breach or in the event of any order being made or any resolution passed for the winding up of the licensee except a resolution for winding up with a view to reconstruction then and in any such event the patentee may forthwith by notice to the licensee determine this licence.

Now, it is to be observed that the parties clearly contemplated that the licensee company might go into voluntary liquidation with a view to reconstruction, and that in such event the benefit of the licence would be assigned to the reconstructed company. It is also clear that they contemplated the possibility of the licensee company going into liquidation otherwise than with a view to a reconstruction, and that in such event the benefit of the licence would be assigned unless the patentee determined the licence. For if this were not so, the provisions of clause 16 relating to the winding up of the licensee would be almost meaningless. Every winding up involves the sale of the company's assets, and the power to determine the licence in the event of a winding up other than for the purposes of reconstruction must have been inserted in order to enable the patentee, if he so desired, to prevent the licence being sold. In these circumstances it cannot be said that an assignment of the licence was not contemplated by the parties. The word " licensee " where used in the licence must therefore be read as meaning the licensee and those who might be its assigns in the event of a liquidation.

The next thing to be observed is that a patentee is fully entitled to assign his rights under the letters patent to another, and that this must be deemed to have been known to the parties. Such an assignment could not, of course, defeat the rights of the licensee under the licence. It was indeed suggested in the argument for the respondents that the licence only conferred some interest in equity and that it would not prevail against the title of a purchaser of the legal interest in the letters patent without notice of the licence. No authority was cited that in any way supports this extraordinary proposition, and, in my opinion, it is without any foundation. It is said in *HINDMARCH ON PATENTS* that a licence to use an invention comprised in a patent is in fact a grant of a right by the patentee to the licensee and, until the present case, I have never heard any suggestion to the contrary. But though the licence would remain in full force after an assignment of the patent the licensee would only continue to exercise it upon the terms as to payment of royalties and otherwise that are contained in it. This being so, it would seem plain that if the patentee is to be regarded as having the power of assigning the patents and can only assign them subject to the rights of the licensee, he must also be regarded as having the power at the same time to assign the benefits accruing to him under the licence.

If, then, the parties had in their minds the possibility of an assignment of the patents by the patentee and we must, I think, assume this to have been the case, it is incredible that they did not intend the patentee to have power to assign his right to be paid royalties under clause 10 and his power of agreeing the royalties to be charged under clause 8. In other words, I think that we are constrained to read the words "the patentee" in clauses 8 and 10 as meaning the patentee and its assigns. If this be right, the word must have the same meaning in clause 16. The parties could not have intended that the power to determine the licence for non-payment of the royalties should be severed from the right to receive the royalties, or that a company that had ceased to have any interest in the patent should be able to determine the licence. It seems plain, moreover, that in clauses 5 and 6 of the licence the word "patentee" must also be read as "patentee or its assigns." For after an assignment of the patent the use of the patentee's name would in no way help the licensee to resist revocation of the patent or maintain an action for infringement. It would be the name of the assignee that the licensee would require to use for those purposes.

These considerations seem to lead inevitably to the conclusion that the word "patentee" throughout the licence, and, therefore, in clause 3, must have been intended to mean the patentee and its assigns. It was contended on behalf of the respondents that this could not have been so in the case of clauses such as 2, 4 and 11, which impose obligations of a positive character upon the patentee inasmuch as the obligations

would not be enforceable against an assignee. But the fact that such obligations would not be directly enforceable against the assignee affords no reason for thinking that all the rights of the patentee under the patent are not assignable. For the patentee's assignee could not enforce those rights except upon the terms of fulfilling the obligations imposed upon the patentee. The word "patentee" moreover in a licence is commonly made in express terms to include the patentee, his executors, administrators and assigns. (See KEY & ELPHINSTONE'S PRECEDENTS IN CONVEYANCING, 13th Edn., Vol. 2, p. 442), notwithstanding the fact that the licence imposes positive obligations upon the patentee. It was further objected on behalf of the respondents that clauses 2 and 3 were based upon the confidence that each party reposed in the other and that the licensee could not, therefore, be asked to perform clause 3 in favour of any person or company other than the patentees themselves. The licence, it was said, created a *quasi*-partnership between the parties and the respondents could not be compelled to have another *quasi*-partner thrust upon them. But I can find nothing in the licence that remotely resembles a partnership agreement. There was to be no co-operation between the parties in working the process or in exploiting the invention. The process was apparently to be worked not by the patentee or licensee but by their respective licensees and under-licensees. In granting these each party would act independently of the other—the only matter in which they were to act in concert being any variation of the agreed royalty of 6*d.* per ton. I can see no reason whatever for thinking that the terms of the licence, so far as they had to be performed by the patentee, could not be just as satisfactorily performed by an assignee of the letters patent. So long as the licensee company is paid its one-fourth share of the royalties received under the other licences granted by the patentee it was, I should have thought, a matter of complete indifference to that company who it is that grants the licences and by whom it is that the royalties are paid.

I, therefore, come to the conclusion that the word "patentee" in clause 3 of the licence means the patentee and its assigns. The benefits reserved to the patentee by that clause are just as much part of the consideration accruing to the patentee for the granting of the licence as is the share of the royalties payable under clause 10, and the plaintiffs, as the assignees of the patentee, are in my judgment entitled to the benefit of both those considerations.

For these reasons, I think that this appeal should be allowed with costs here and below and a declaration made as asked by the statement of claim.

EVE, J.: The question involved in this appeal is purely one of construction, and, with all respect to the learned judge, I prefer the

construction arrived at by the judgments which have just been read, to his. The appeal, in my opinion, must be allowed.

Appeal allowed, with costs.

Solicitors : *Slaughter & May* (for the appellants) ; *Nicholson, Graham & Jones* (for the respondents).

[Reported by E. FULLER BRISCOE, ESQ., *Barrister-at-Law.*]

ATTORNEY-GENERAL *v.* OLDHAM CORPORATION.

[CHANCERY DIVISION (Bennett, J.), **July 9, 1936.**]

Local Government—Public utility undertaking—Reserve Fund—Application of fund—Relief of unemployed.

The defendants were authorised by the Oldham Corporation Act, 1925, to supply gas, water and transport services, and their duties as regards the revenue from and expenses incurred in connection with these services are set out in sects. 310 and 311 of that Act. The defendants, with the object of providing work for the unemployed, transferred from each of the reserve funds of the gas, water and transport undertakings £5,000 to the general rate fund. An action was brought at the relation of neighbouring councils, in whose areas the defendants were authorised to supply the above services, for (i) a declaration that the transfer was contrary to the Oldham Corporation Act, 1925, s. 311, and *ultra vires*, (ii) an order that the defendants transfer the sums back to the respective reserve funds, and (iii) for an injunction restraining the defendants from transferring any sums from any of those reserve funds to their general rate fund. The defendants contended that the spending of the money was not *ultra vires*. Alternatively they counterclaimed for a declaration that the sums of £5,000 might have been charged against revenue :—

HELD : (i) the language of the Oldham Corporation Act, 1925, s. 311 (1) (g) was imperative, and the transfer of the sums of £5,000, not being one of the purposes mentioned in that paragraph, was *ultra vires*.

(ii) it would have been *ultra vires* the defendants to have spent money upon the relief works in question out of the revenues of the three undertakings and the declaration asked for in the counterclaim could not be made.

[**EDITORIAL NOTE.** Although this case is only concerned with the special Act for the Oldham Corporation, the provisions therein contained with reference to the formation and application of a reserve are not essentially different from those applicable to all public utility or municipal trading undertakings. The provisions of the Model Gas Bill, the Electric Lighting (Clauses) Act, 1899, sched. s. 7, as amended by Electricity (Supply) Act, 1926, s. 43, sched. V, Waterworks Clauses Act, 1847, s. 76, are very similar and the reasoning of this judgment would seem to be equally applicable to all.

AS TO RESERVE FUNDS, see HALSBURY, Hailsham edn., Vol. 12, pp. 619-621, para. 1203 ; Vol. 15, p. 655, para. 1149 ; and 1st edn., Vol. 28, Water Supply, pp. 328, 329, para. 601.]

ACTION by the Attorney-General at the relation of the Chadderton, Royton, Crompton, Failsworth, Lees and Springfield Urban District Councils and the Limehurst Rural District Council against the Oldham Corporation for :

(1) A declaration that the transfer in 1935 to the defendants' general rate fund of £5,000 from the reserve fund of the defendants' water undertaking, and of £5,000 from the reserve fund of the defendants' transport undertaking was contrary to the Oldham Corporation Act, 1925, s. 311, and *ultra vires* ;

(2) An order that the defendants transfer the above-mentioned sums back to the reserve funds of the respective undertakings ;

(3) An injunction restraining the defendants from transferring any sums from any of these reserve funds to their general rate fund contrary to sect. 311.

The defendants were authorised by statute to supply gas, water and transport services not only in their own area, but in other areas including those of the relators. The plaintiffs contended that the defendants had acted contrary to the Oldham Corporation Act, 1925, s. 311, in applying moneys from these reserve funds for the execution of road repairing schemes in an attempt to relieve unemployment. The defendants pleaded that the statute did not bar them from spending these moneys to provide work for the unemployed.

Cyril Radcliffe, K.C., and *Maurice FitzGerald* for the plaintiffs.

Sir Stafford Cripps, K.C., and *G. Granville Slack* for the defendants.

BENNETT, J. : This is an action by His Majesty's Attorney-General at the relation of six urban district councils and one rural district council against the mayor, aldermen and burgesses of the County Borough of Oldham. The relators are charged with the duty of exercising local government in areas that are near to or adjoining the areas in which the defendant corporation is the local authority. Under the authority of various Acts of Parliament and statutory orders the defendant corporation carries on what has been referred to as three public utility undertakings. They supply gas, they supply water and they provide transport not only in the area they govern, but in the areas for the local government of which the seven relators respectively are responsible. The plaintiff alleges that in the course of the year beginning on Apr. 1, 1934, and ending on Mar. 31, 1935, the defendants transferred from the three reserve funds established in respect of each of their said three public utility undertakings to their general rate fund three sums of £5,000, and used such sums for the purpose of providing work for unemployed persons resident in the County Borough of Oldham. The plaintiff's contention is that the transfer of these sums was contrary to the provisions of the Oldham Corporation Act, 1925, s. 311, and *ultra vires*. He

claims a declaration to that effect, an order that the defendants do transfer from their general rate fund to the respective reserve funds of the three undertakings three sums of £5,000, and an injunction to restrain the defendants from transferring any sums from any of the said reserve funds to the general rate fund contrary to the provisions of sect. 311 of the said Act.

The defendants are a county borough to whom the provisions of the Local Government Act of 1933 apply. They were incorporated as a municipal borough in the year 1849. They became a county borough in the year 1888, and being one of the boroughs named in part II of the first schedule of the Local Government Act of 1933 are a county borough within the meaning of that Act. The defendants have carried on their gas, water and transport undertakings for many years, and their powers and duties in respect of these undertakings are now to be found in the Oldham Corporation Act of 1925. As regards the revenue from and expenses incurred in connection with these undertakings this Act in sects. 310 and 311 imposed upon the defendants as from Apr. 1, 1926, certain specific duties. Before Apr. 1, 1926, the duties of the defendants in regard to the revenue of their transport undertaking were prescribed by the Oldham Corporation Act, 1899, s. 53, and in regard to the revenue of their water undertaking by the Oldham Corporation Act, 1909, s. 25, and in regard to the revenue of their gas undertaking by sect. 75 of the same Act. By the Oldham Corporation Act, 1925, s. 309, as from Apr. 1, 1926, these three sections were repealed.

The Oldham Corporation Act, 1925, ss. 310 and 311, read as follows :

310.—As from Apr. 1, 1926, all money received by the corporation on account of the revenue of the following undertakings (namely) : (1) the tramways undertaking ; (2) the water undertaking ; (3) the gas undertaking ; (4) the electricity undertaking ; and (5) the markets undertaking, shall be carried to and shall form part of the borough fund and all payments and expenses made and incurred in respect of those undertakings shall be paid out of that fund.

311.—(1) As from Apr. 1, 1926, the corporation shall keep their accounts so as to distinguish capital from revenue and as regards the revenue accounts to show under a separate heading or division in respect of each of the following undertakings (that is to say) the tramways undertaking, the water undertaking, the gas undertaking, the electricity undertaking and the markets undertaking (each of which is in this section separately referred to as "the undertaking") on the one side all receipts in respect of the undertaking, and on the other side all payments and expenses in respect of the undertaking, such payments and expenses being divided so as also to show in each case the amounts expended in respect of each of the following purposes (that is to say) : (a) The working and establishment expenses and cost of maintenance of the undertaking ; (b) The payment of annuities payable in respect of the water and gas undertakings and the requisite provision for redemption of the said annuities ; (c) The interest on moneys borrowed and applied by the corporation for the purposes of or connected with the undertaking ; (d) The requisite appropriations instalments or sinking fund payments in respect of moneys borrowed and applied for the purposes of the undertaking ; (e) All other expenses

(if any) of the undertaking properly chargeable to revenue ; (f) In the case of the gas undertaking an appropriation in relief of the borough rate of an annual sum of £4,000 ; (g) The amount (if any) paid to a reserve fund which the corporation are hereby authorised to maintain (if the corporation think fit) in respect of the undertaking by setting aside such an amount as they may from time to time think reasonable and investing the same and the resulting income thereof in statutory securities and accumulating the same at compound interest until the fund so formed amounts to the maximum reserve fund for the time being prescribed by the corporation, not exceeding a sum equal in the case of the water undertaking and the gas undertaking and the electricity undertaking respectively to one-tenth of the aggregate capital expended for the time being by the corporation upon the undertaking, which fund shall be applicable to meet any extraordinary claim or demand at any time arising against the corporation in respect of the undertaking or for payment of the cost of renewing any part of the works forming part thereof or for any extension of the said works or otherwise for the benefit of the undertaking and so that if that fund be at any time reduced it may thereafter be again restored to the prescribed maximum and so from time to time as often as such reduction happens : Provided that the corporation may resort to any such fund for the above purposes notwithstanding that the same may not at any time amount to the limit (if any) hereinbefore prescribed : Provided also that the corporation may use any moneys for the time being standing to the credit of any such fund as working capital of the undertaking and in such event they shall credit such fund from revenue account under the heading of the undertaking with interest at the rate of £3 10s. per centum per annum during the period of use on so much of the fund as shall be so utilised : Provided further that—(a) in the case of the water undertaking when the amount for the time being in the reserve fund shall exceed the sum of £25,000 the sum to be set aside as aforesaid in any one year shall not exceed an amount equal to one-half per centum of the aggregate capital expenditure of that undertaking ; (b) in the case of the water undertaking and of the gas undertaking respectively whenever the total receipts from revenue in respect thereof shall exceed the total of the payments and expenses on account of revenue in respect thereof as shown by the accounts to be kept in pursuance of this section (including any payments to a reserve fund) an amount equivalent to the amount of such excess shall whenever and so soon as there shall be an amount sufficient for the purpose be applied to the reduction of the water rents for domestic purposes or of the gas charges as the case may be equally throughout the limits for the supply by the corporation of water or gas respectively ; and (c) in the case of the electricity undertaking if the total receipts from revenue in respect thereof in any year shall exceed the total of the payments and expenses on account of revenue in respect thereof in that year as shown by the accounts to be kept in pursuance of this section (including any payments to a reserve fund) by an amount exceeding £5 per centum per annum upon the aggregate capital expenditure of that undertaking the corporation shall make such reductions or adjustments in the charge for the supply of electrical energy as in their judgment will reduce the excess of the said receipts over the said payments to an amount not exceeding the amount of the said five per centum.

Sect. 311 (2) and (3) are not material.

It is to be observed in passing that by virtue of the provisions of the Rating and Valuation Act, 1925, s. 10 (1), the references in the Oldham Corporation Act of 1925 to the borough funds are to be construed as references to the general rate fund.

Before stating the facts which have led up to the action there are two sections in part VIII of the Local Government Act, 1933, which have a bearing upon the questions in issue. They are sects. 185 and 194 and they read as follows :

185. (1) All receipts of the council of a borough, including the rents and profits of all corporate land, shall be carried to the general rate fund of the borough, and all liabilities falling to be discharged by the council shall be discharged out of that fund. (2) An account, called the "general rate fund account," shall be kept of all receipts carried to, and payments made out of, the general rate fund : Provided that, where any such receipts are receipts for the benefit of a part only of the borough, or any such payments are payments in respect of expenditure with which a part only of the borough is chargeable, a separate account shall be kept of receipts and payments in respect of that part of the borough. (3) If the general rate fund is more than sufficient for the purposes to which it is applicable, the surplus thereof may be applied under the direction of the council for the public benefit of the inhabitants and improvement of the borough.

194. Nothing in this part of this Act shall —(a) be deemed to require or authorise a local authority to apply or dispose of the surplus revenue arising from any undertaking carried on by them otherwise than in accordance with the provisions of any enactment or statutory order relating to the undertaking ; or (b) affect the operation of the Roads Act, 1920, s.1, or of any order in council made thereunder

The sections I have read contain all the statutory provisions that have to be interpreted and applied to the facts of the case in order to determine whether the plaintiff's case is well founded. The facts which are not in dispute are as follows : On Sept. 12, 1934, the town council of the defendants passed the following resolution :

That in view of the widespread unemployment and distress in the borough, the finance and general purposes committee be requested to sanction the expenditure of a sum not exceeding £20,000 for the carrying out of necessary works in connection with making, repair and maintenance of roads and sewers with the object of providing work for the unemployed, and that the four trading undertakings of the corporation be desired to make a grant in equal proportions of the total amount involved in giving effect to this resolution with the object of avoiding the necessity for the levying of a supplementary rate for the purpose.

On Sept. 13, 1934, the resolution passed by the town council came before the finance and general purposes committee of the defendants and the record of what that committee resolved is as follows :

The town clerk submitted the resolution passed by the council last evening, on the motion of Councillor Bannon, with reference to providing work for the unemployed, and it was resolved —(a) That in view of the widespread unemployment and distress in the borough, the committee sanction the expenditure of a sum not exceeding £20,000 for the carrying out of necessary works in connection with the making, repair and maintenance of roads and sewers with the object of providing work for the unemployed, and (b) That the four trading undertakings be desired to make a grant in equal proportions of the total amount involved in giving effect to the resolution.

The four trading undertakings included the gas undertaking, the water undertaking and the passenger transport undertaking. The resolution of the town council also came before the waterworks committee, the gasworks committee, and the passenger transport committee of the town council and the acts of those committees respectively are stated in paras. 8, 9 and 10 of the defence, which paragraphs read as follows :

8.—On Sept. 19, 1934, the waterworks committee of the said council resolved : “ That the committee agree to the recommendation of the finance and general purposes committee.” An invoice was in due course presented to the waterworks committee, and on Jan. 23, 1935, the said waterworks committee resolved that the amount of £5,000 be paid out of the reserve fund. On Jan. 31, 1935, a cheque for £5,000 was drawn on the general rate fund by the borough treasurer payable to “ self,” and on Feb. 8, 1935, the said cheque was paid into the said general rate fund.

9.—On Sept. 26, 1934, the gasworks committee of the said council after considering the resolution referred to in para. 7 hereof resolved : “ That this committee accede to the request.” An invoice was in due course presented to the gasworks committee, and payment thereof (together with other invoices) was authorised by the committee on Jan. 16, 1935. On Jan. 17, 1935, a cheque for £5,000 was drawn on the general rate fund of the defendants by the borough treasurer payable to “ self,” and on Feb. 8, 1935, the said cheque was paid into the said general rate fund.

10.—On Sept. 26, 1934, the passenger transport committee of the said council resolved : “ That in conformity with the desire expressed by the finance and general purposes committee a grant of £5,000 be made towards the cost of providing work for the unemployed, and that the sum be taken from the reserve fund, and further that it be a recommendation to the surveyors and buildings committee that in arranging for the carrying out of the relief works in question, regard should be had to the condition of a number of roads which are used by the public service vehicles belonging to this department, and of the need of their immediate repair with a view to assisting this committee in effecting economies in the cost of the repair and maintenance of their rolling stock.” An invoice was in due course presented to the passenger transport committee, and on Jan. 16, 1935, payment thereof was authorised by the committee. On Jan. 17, 1935, a cheque for £5,000 was drawn on the general rate fund by the borough treasurer payable to “ self,” and on Feb. 8, 1935, the said cheque was paid into the general rate fund.

Para. 11 of the defence contains the following allegation :

In respect of each of the said payments referred to in paras. 8, 9 and 10 hereof, an entry was duly made in the cash book and the analysis of the expenditure book of each of the respective undertakings, and the sum of £5,000 debited against the reserve account of each of the said undertakings. The said sums of £5,000 were credited to the account of the surveyors and buildings committee, and were duly expended under the direction of the said town council on the carrying out of works in connection with the making, repairing and maintenance of roads and sewers with the object of providing work for the unemployed and for the public benefit of the inhabitants and improvement of the said county borough. A proportion of the said sums was expended on the repair of certain roads used by public service vehicles belonging to the passenger transport undertaking in accordance with the recommendation contained in the resolution set out in para. 10 hereof.

A statement was produced on behalf of the defendants, giving particulars of the works executed by the defendants upon which the three sums of £5,000 together with other moneys had been expended. That statement was accepted by Mr. Radcliffe on behalf of the plaintiff as being accurate, and it shows an expenditure of £14,009 15s. 3d. on roads, and £5,997 4s. 4d. on sewers. Of the sum spent on roads £4,064 1s. 0d. was spent on roads which are used by the defendants' omnibuses. The defendants in respect of each of the three undertakings with which the action is concerned do keep separate accounts as they are required to do by the Oldham Corporation Act, 1925, s. 311. The financial year of the defendants ends on Mar. 31, and the accounts of the three undertakings for the year ended Mar. 31, 1935, were put in at the trial. The accounts of the water and gas undertakings respectively include accounts described as reserve fund accounts. The accounts of the passenger transport undertaking contain two reserve fund accounts, one described as passenger transport reserve fund (accident account), the other as passenger transport (renewal account).

It was suggested that these accounts are not really accounts of the reserve funds which the corporation are authorised to maintain by sect. 311 (1) (g) of the Act of 1925. There was no foundation in fact for that suggestion and I hold that they were. [His Lordship considered in detail the accounts relating to the defendants' gas undertaking for the year ending Mar. 31, 1935.]

The accounts to which I have referred make it plain beyond doubt that the defendants did take a sum of £5,000 which formed part of the reserve fund in respect of their gas undertaking at the beginning of the year Apr. 1, 1934, and the statements in para. 11 of their defence make it clear that the money was spent upon relief works under the direction of the town council of the defendants. The accounts relating to the defendants' water undertaking and their passenger transport undertaking make it equally clear that two sums each of £5,000 forming part of the reserve funds of these undertakings respectively on Apr. 1, 1934, were in the course of the year 1934-1935 transferred to the defendants' general rate fund and the allegations in para. 11 of the defence make it clear that these sums were also expended upon relief works under the direction of the defendants' town council.

I have mentioned the suggestion in argument by the defendants that the reserve fund accounts were not really the reserve funds referred to in sect. 311 (1) (g) of the Act of 1925. I have said there is no foundation in fact for the suggestion. The point was not taken in the defence and was not, I think, seriously pressed. In any case, in my judgment, the reserve fund accounts shown in the printed accounts published by the defendants in respect of the three undertakings in question are accounts relating to the reserve fund, that the defendants were authorised to

maintain by sect. 311 (1) (g) of the Act of 1925. In my judgment the defendants must be taken to have determined to pay to those reserve funds respectively out of the revenues of the respective undertakings the moneys, which their published accounts show as credited to the respective reserve fund accounts.

The question, then, is whether it was lawful for the defendants to transfer moneys from the statutory reserve funds and use the moneys so transferred to provide work for unemployed persons. In my judgment the answer is in the negative. Once the defendants have determined to pay and have paid money to a reserve fund it is unlawful for them to deal with it in any way other than in the ways specified in sect. 311 (1) (g) or expend it for any other purpose than the purposes specified in that paragraph. The language of the paragraph is, in my judgment, imperative, not permissive. Money paid to a reserve fund must, in my judgment, be invested at compound interest in statutory securities or used as working capital of the undertaking in respect of which the reserve fund was created. If moneys are so used the revenue account of the undertaking is to be charged with and the reserve fund account is to be credited with interest at the rate of $3\frac{1}{2}$ per cent. per annum upon the moneys so used. This is the effect of the second proviso to para. (g). The purposes for which moneys paid to a reserve fund may be expended are: (a) To meet any extraordinary claim or demand arising against the defendants in respect of the undertaking. (b) The payment of the cost of renewing any part of the works forming part of the undertaking. (c) The extension of any such works. (d) Otherwise for the benefit of the undertaking. The expenditure of money to provide work for unemployed persons resident within the borough of Oldham is neither an extraordinary claim against the defendants in respect of the undertakings, nor the renewal of any part of the works forming part thereof, nor the extension of any of such works, nor an expenditure which can fairly be described as otherwise for the benefit of the undertakings or any of them. £3,064 1s. 0d. out of the total sum of £20,006 19s. 7d. spent on relief works was spent upon repairs to or works upon Henshaw Street and Coppice Street, two streets over which omnibuses forming a part of the defendants' passenger transport undertaking travel, and the defendants in para. 14 of their defence contend that they were legally entitled out of the reserve fund of their passenger transport undertaking to pay for the repair of roads used by their public service vehicles. The defendants called no evidence as to the nature of the repairs upon the streets in question, or as to the extent to which they were used by their public service vehicles. In the absence of any evidence I am not prepared to hold that cost of repairing a street used by public service vehicles is the cost of renewing a part of the works forming a part of the defendants' passenger transport undertaking, or that in some other way not proved or stated expenditure

on those streets was otherwise for the benefit of the defendants' passenger transport undertaking.

In my judgment, therefore, the plaintiff has proved that the transfer of the three sums of £5,000 from the reserve funds established in respect of the three undertakings in question, and the expenditure thereof upon relief works for unemployed was *ultra vires*. But then the defendants say: "This is merely a mistake in book-keeping. Although it may be that it was *ultra vires* to transfer the sums in question out of moneys which had been paid to reserve, we might have made the payments out of reserve," and so they counterclaim for a declaration that each of the three sums might have been debited against the reserve of the undertaking from the reserve fund of which it was transferred. The right to charge these sums against revenue depends upon whether the defendants can use the reserves of the undertakings in question for all purposes for which the income of the borough may be used. For the plaintiff it is argued that by necessary implication the language of sect. 311 prohibits the defendants from expending the revenues of the three undertakings upon relief works. On his behalf it was contended that the section is by necessary implication imperative, not merely as regards the keeping of separate accounts, but also as regards the application of the revenues derived from the undertakings. The defendants' contention is that the language of the section is imperative only as regards accounts and not as regards the application of the revenues of the undertakings. The foundation of their argument was a contrast between the language of the section relating to the revenues of the passenger transport undertaking and the water undertaking (contained in the Oldham Corporation Act, 1899, s. 53, and the Oldham Corporation Act, 1909, ss. 25 and 75, repealed by the Oldham Corporation Act, 1925, s. 309) with the language of sect. 311 of that Act which takes the place of the repealed sections. They say, and say truly, that the repealed sections were expressly imperative with regard to the application of the revenues of the three undertakings in question, whereas sect. 311 of the Act of 1925 in terms deals only with the keeping of accounts and their form. On that foundation is based the argument that because the sections containing imperative directions with respect to the application of revenues have been repealed, and because there is no imperative direction in this regard in the section which has replaced the repealed sections, Parliament must have intended to free the defendants from the obligations imposed by the repealed sections. The argument is, in my judgment, unsound. The meaning and effect of sect. 311 of the Act of 1925 must be ascertained by interpreting the language employed in that section. No useful purpose is served by contrasting the language with the language of repealed provisions in other Acts of Parliament.

In my judgment, upon the true construction of sect. 311 of the Act

of 1925, the defendants are prohibited from expending the revenues of the three undertakings for any purposes other than those which they are obliged to show in the accounts which they are bound to keep, and for these reasons: (i) The provisions of the section apply to the five undertakings mentioned in sect. 310. (ii) They must be interpreted and applied in the same way to each undertaking except where otherwise expressly provided. (iii) The section provides that in the case of the water undertaking and of the gas undertaking, whenever the total receipts from revenue in respect thereof shall exceed the total of the payments and expenses on account thereof, as shown by the accounts to be kept in pursuance of the section, including any payments to a reserve fund, an amount equivalent to the amount of the excess shall, whenever and so soon as there shall be an amount sufficient for the purpose, be applied to the reduction of water rates for domestic purposes or of gas charges, as the case may be, throughout the limits of the supply by the defendants of water or gas respectively. This provision is imperative and might be altogether defeated if the defendants were free at any time to charge the revenues of either the gas or water undertakings with payments made to their general rate fund. (iv) Subsect. (1) (f) of the section provides for the accounts showing an appropriation out of the revenue of the gas undertaking in relief of the borough rate of an annual sum of £4,000. This provision is meaningless if the defendants can at any time make any payment they please in relief of the borough rate out of the revenue of the gas undertaking.

The conclusions upon the whole matter are, in my judgment, as follows: First, that three sums each of £5,000 were in fact in the course of the year 1934-1935 taken from each of the reserve funds established by the defendants under the provisions of the Oldham Corporation Act, 1925, s. 311, in respect of the gas, water and passenger transport undertakings respectively. Secondly, that these three sums were paid by the defendants into their general rate fund and spent upon relief works for the benefit of unemployed persons resident in the borough of Oldham. Thirdly, that the transfer of these sums from their respective reserve funds was *ultra vires*. Fourthly, that it would have been *ultra vires* the defendants out of the revenues of the three undertakings in question to have spent money upon the relief works in question and to have charged the moneys so spent in the separate accounts which the defendants are required to keep by sect. 311 of the said Act. It follows that the action succeeds and that the plaintiff is entitled to the declaration and order asked for by paras. (a) and (b) of the first prayer of the statement of claim. I do not suppose an injunction as asked by para. (c) of that prayer is necessary now that the rights of the defendants have been declared, and I propose to give the plaintiff liberty to apply for an injunction.

The defendants must pay the plaintiff's costs of the action. The

counterclaim is dismissed with costs. I say nothing about the rights of the defendants to deal with any surplus of revenue over expenditure appearing upon the separate account to be kept in respect of the passenger transport undertaking. That question has not been raised in the action and I decide nothing about it.

Solicitors : *Lees & Co.* (for the plaintiff) ; *Sharpe, Pritchard & Co.*, agents for *J. J. Williams*, Town Clerk, Oldham (for the defendants).

[Reported by FRANK ROWE, ESQ., Barrister-at-Law.]

SHIPTON, ANDERSON & CO. (1927), LTD. (IN LIQUIDATION)
v. MICKS, LAMBERT & CO.

[KING'S BENCH DIVISION (Branson, J.), July 3, 1936.]

Sale of Goods—Default by seller—Express power of re-purchase—Special procedure under power—Availability of common law remedy—Exercise of common law remedy and exemption from liability to account under express power.

By certain contracts for the sale of wheat it was provided by clause 5 : " In default of fulfilment of contract by either party, the other, at his discretion, shall, after giving notice by letter or telegram, have the right of re-sale or re-purchase, as the case may be, and the defaulter shall make good the loss, if any, on such re-purchase or re-sale on demand. In case either party shall suspend payment, he shall be deemed to be in default, and the other party shall, after giving notice by letter or telegram to the defaulting party, and notwithstanding any bankruptcy or liquidation, be entitled immediately to re-sell or re-purchase, as the case may be, and shall also be entitled to be paid, or to prove in any bankruptcy, liquidation or otherwise, for the loss, if any, or shall account for the profit, if any, occasioned by such re-sale or re-purchase." Before the arrival of the first of the ships which were carrying the parcels appropriated to the various contracts, the sellers suspended payment. The buyers becoming aware of this, proceeded to buy wheat of the description which they were expecting to get under their contracts with the sellers, in order to have wheat to deliver in fulfilment of the contracts which they had made. No notice of any kind was given to the sellers of such purchases. The liquidator of the sellers claimed against the buyers the difference between the price payable under the contracts between the sellers and the buyers and the price at which the buyers purchased the wheat of similar quality and quantity :—

HELD : (i) in the event of suspension of payment by one party, the party not in default had an option either to wait until the time for fulfilment of the contract and exercise his common law rights in respect of the default of fulfilment or to proceed under clause 5, and re-sell or re-purchase as the case might be. In order to proceed under this clause, he must give the notice required by the clause and he would be under a liability to account.

(ii) the buyers, having given no notice, had not proceeded under clause 5, and were not liable to account to the sellers.

[EDITORIAL NOTE. The contract in this case provided a special remedy in case one party suspended payment, became bankrupt or the like. The remedy

was to be pursued after giving notice to the other side. A party to whom this remedy became available carefully avoided giving any notice, and proceeded to his ordinary remedy at common law. It is held that, since no notice was given, the party was pursuing his common law remedy and therefore did not have to comply with the terms of the special remedy which would have required him to account for the profit made. The case should be compared with *Simmonds v. Millar & Co.* (1898), 15 T.L.R. 100 ; 39 Digest 660, 2516.

AS TO EXPRESS POWER OF RE-SALE OR OF RE-PURCHASE, see HALSBURY, 1st Edn., Vol. 25, Sale of Goods, p. 265, para. 462 ; and FOR CASES see DIGEST, Vol. 39, pp. 639-642, Nos. 2352-2377, and p. 660, No. 2516.]

Case referred to :

- (1) *Sven Hylander & Co. v. Blake, Dobbs & Co. (Incorporated)* (1925) 22 Lloyd L.R. 528.

SPECIAL CASE STATED by an arbitrator. In April and May, 1935, Shipton, Anderson & Co. (1927), Ltd., the claimants, sold to Micks, Lambert & Co., the respondents, certain quantities of wheat for future shipment. By the contracts it was provided *inter alia* :

5. In default of fulfilment of contract by either party, the other, at his discretion, shall, after giving notice by letter or telegram, have the right of re-sale or re-purchase, as the case may be, and the defaulter shall make good the loss, if any, on such re-purchase or re-sale on demand. In case either party shall suspend payment . . . he shall be deemed to be in default, and the other party shall, after giving notice by letter or telegram to the defaulting party, and notwithstanding any bankruptcy or liquidation, be entitled immediately to re-sell or re-purchase, as the case may be, and shall also be entitled to be paid, or to prove in any bankruptcy, liquidation or otherwise, for the loss, if any, or shall account for the profit, if any, occasioned by such re-sale or re-purchase.

The case stated, so far as material, was as follows :

3. On July 8, 1935, the claimants being in financial difficulties, suspended payment. The respondents became aware of that fact on July 9, and on July 12, 1935, they received a letter from the claimants formally notifying them that the claimants had decided on July 8, to go into voluntary liquidation forthwith.

4. On becoming aware that the claimants had suspended payment all the first sellers [the claimants' sellers], whose contracts with the claimants were on printed forms similar to those [of the claimants with the respondents], gave notice to the claimants . . . that in pursuance of clause 5 of their contracts they were proceeding to sell their respective parcels against the claimants.

5. It became known to the first sellers that the respondents were the purchasers from the claimants of part of the wheat afloat in the steamers [enumerated in the case]. The first sellers . . . got into communication with the respondents with a view to selling to the respondents documents representing wheat of the quantity and description which had been appropriated by the claimants to their contracts with the respondents. As a result of negotiations between the first sellers or their representatives and the respondents various quantities of wheat were purchased by the respondents.

6. These negotiations were conducted by Mr. Lambert, the senior partner of the respondent firm. When negotiating Mr. Lambert knew that the first sellers had given the claimants notice that they were going to sell against the claimants and

that the first sellers or their representatives were offering wheat which was the subject of such notice. He also had in mind clause 5 of the conditions and rules endorsed on the contracts between his firm and the claimants and he was anxious not to make any purchases which might be construed as re-purchases or purchases under the said clause; he wished to avoid the position, which however subsequently arose and which is the subject matter of dispute in this arbitration, namely, of having to meet a claim by the liquidator of the claimants to account for profit occasioned by re-purchases or purchases made in pursuance of the said clause. Consequently when negotiating with the first sellers or their representatives he informed all of them that he wished it to be understood that he was not purchasing against the claimants but was making purchases as new business in the open market. By this he meant that he was not re-purchasing in consequence of any contractual obligations with the claimants, but was purchasing as in the normal course of trading.

7. The respondents gave no notice of any kind to the claimants under clause 5 of the said contracts and the liquidator made no communication to the respondents as to whether, or not, he intended to fulfil the said contracts by tendering shipping documents, or otherwise. The contracts between the claimants and the first sellers having been cancelled by the latter the liquidator could only implement the claimants' contracts with the respondents by going into the market and purchasing documents representing wheat which would fit the appropriations the claimants had made to the respondents The liquidator never tendered any shipping documents to the respondents.

10. On July 9, 1935, the respondents had commitments arising out of sales of wheat which they could only satisfy either by documents received under their contracts with the claimants or by making other purchases. I find that the purchases by the respondents on July 9 and 10, 1935, were made for the purposes of meeting such commitments.

The liquidator claimed the difference between the prices of the contracts between the claimants and the respondents and the respondents and the first sellers or their representatives. The liability (if any) of the respondents was agreed to be £1,815 18s. 6d. The question for the decision of the court was whether on the facts found by the arbitrator and on the true construction of the contracts the claimants were entitled to be paid the sum claimed or any part thereof. In the event of a decision in favour of the claimants, the arbitrator awarded :

that the respondents do pay to the claimants the said sum of £1,815 18s. 6d., or such part thereof as the court may decide to be payable and . . . that the respondents do pay to the claimants their costs.

And in the event of a decision in favour of the respondents, the arbitrator awarded :

that there is nothing due from the respondents to the claimants and . . . that the claimants do pay to the respondents their costs.

H. U. Willink, K.C., and *John Megaw* for the claimants.

W. L. McNair for the respondents.

BRANSON, J. : This is an appeal by way of case stated on the award of an arbitrator in a claim by the liquidator of Shipton,

Anderson & Co. (1927), Ltd., against Messrs. Micks, Lambert & Co. The facts of the case are fully stated in the special case ; and I do not propose to go through them in detail ; but just to summarise them, so far as material for the judgment which I have to deliver. Six contracts, each for the sale of certain quantities of wheat, were entered into in the months of April and May, 1935, between Shipton, Anderson & Co. and Micks, Lambert & Co., in which Shipton, Anderson & Co. were the sellers and Micks, Lambert & Co. the buyers, of the wheat in question. Five of the contracts were made upon form No. 28 of the London Corn Trade Association, a form for Canadian and United States of American wheat. The last one was made under the same association's form No. 36. The forms differ slightly in language, but in no material way ; and I therefore propose to deal with the language of form No. 28 as applying to all the contracts.

The contracts having been made in April and May, appropriations were duly made in pursuance of the contracts. In the case there is a list which shows the various vessels which were carrying the parcels appropriate to the various contracts. Before the first of those ships had arrived, to wit, on July 8, 1935, the claimants, that is to say, Shipton, Anderson & Co., being in financial difficulties, suspended payment ; and the respondents, Micks, Lambert & Co., became aware of that fact on the following day. The respondents, having become aware of that fact, proceeded upon July 9 and 10 to purchase wheat of the description which they were expecting to get under their contract with Shipton, Anderson & Co., in order to have that wheat to deliver in fulfilment of the contracts which they had made. In purchasing that wheat, Mr. Lambert, the gentleman dealing on behalf of Micks, Lambert & Co., was careful to make it plain that he bought this wheat in the ordinary way as a purchaser in the market. But it has been found in the case—and I think there is no doubt about it—that Micks, Lambert & Co. bought these particular parcels of wheat which they did buy in order to put themselves in a position to fulfil contracts which they had intended to fulfil by passing on the documents relating to the wheat they had purchased from Shipton, Anderson & Co. No notice of any kind was given by Micks, Lambert & Co. to Shipton, Anderson & Co. of what they were proposing to do ; nor was any reference made to the contractual position between the two firms.

In those circumstances, the liquidator of Shipton, Anderson & Co. claims against Micks, Lambert & Co. the sum of £1,815 18s. 6d., which represents the difference between the price that Micks, Lambert & Co. would have had to pay to Shipton, Anderson & Co., had Shipton, Anderson & Co. completed the contract which they had entered into, and the price at which Micks, Lambert & Co. were able to acquire the wheat of the necessary quality and description to fulfil their contracts with

the particular purchasers, which they had intended to fulfil by passing on the documents which they expected to receive from Shipton, Anderson & Co. This claim is made upon clause 5 of the conditions and rules of contract form No. 28. I think it is necessary that I should read that clause, which is as follows :

In default of fulfilment of contract by either party, the other, at his discretion, shall, after giving notice by letter or telegram, have the right of re-sale or re-purchase, as the case may be, and the defaulter shall make good the loss, if any, on such re-purchase or re-sale on demand. In case either party shall suspend payment—

and then comes a list of the various ways in which a man may disclose the fact that he is in financial difficulties—

he shall be deemed to be in default, and the other party shall, after giving notice by letter or telegram to the defaulting party, and notwithstanding any bankruptcy or liquidation, be entitled immediately to re-sell or re-purchase, as the case may be, and shall also be entitled to be paid, or to prove in any bankruptcy, liquidation or otherwise, for the loss, if any, or shall account for the profit, if any, occasioned by such re-sale or re-purchase.

The case for the liquidator is that that clause effects an automatic closing of the contract ; in other words, that, as soon as Shipton, Anderson & Co. suspended payment, the contracts between them and Micks, Lambert & Co. were dead ; and that a new right arose under this contract whereby Micks, Lambert & Co., if they chose, could re-purchase the goods ; and if they could get them, if they had to pay a higher price than the contract price for re-purchase, they could claim it in the liquidation. If they paid a lower price than the contract price, they would have to pay into the hands of the liquidator the profit that they had made by the closing of the contract.

It is contended, on the other hand, that what clause 5 does, is to give to the other party to the contract, where one party defaults, an option, which he may exercise or not as he chooses. If he chooses not to exercise the option, he remains with his common law rights ; that is to say, if one party defaults when the time for the completion of the contract arrives the other party may sue him for damages for breach of contract. That is the case which is covered in a sense by the first part of this clause. As it seems to me, it covers not only that which is the ordinary common law right of every person who makes a contract, but it covers something more. A default may be either the default of fulfilment at the end of the contract, or it may be something which would entitle the other party to treat the contract as having been broken in anticipation, and entitle him to proceed to his remedies without waiting to see whether the other party will ultimately perform his contract, in spite of his threats, or will not. According to the common law position, it is quite clear that if one party to a contract

gives to the other one an unequivocal statement that he does not intend to complete the contract, the other party has three courses open to him : He may either accept the breach and proceed to his remedies at once ; or he may wait and he may say : " Well, I will see whether you are really going to maintain this position, or whether you will not, when the time comes to fulfil your contract in time." If he is going to accept the breach as an anticipatory breach, he must give notice and accept it. It seems to me that that is what the first sentence of this clause 5 has in mind : that a party may be in the position in which the other party has to default upon his contract, or may have actually done something which would entitle him to say : " This contract is broken." I think the operation of the first sentence of clause 5 in that case would be that if you write and give the other man notice that you are going to treat what he has done as a breach, you may proceed to buy against him, or to sell against him, and he has got to pay the difference, if any, on demand. Similarly, in the second sentence of clause 5, in my view this is the position that was being dealt with. The fact that a person suspends payment does not at common law entitle anyone who has a contract running with him to say : " You have broken this contract." It puts that other party in the position of having to wait until the time for the fulfilment of the contract arrives and see whether, in spite of suspension of payment, he or the liquidator or the trustee in bankruptcy, will not find it profitable to fulfil the contract and receive the contract price. That is a position which may, in many circumstances, and would generally, put the other party to the contract in a position of great embarrassment. It seems to me that the function of this part of this clause is, in contracts which are made upon this form, to give the other party a right which he does not possess at common law ; and that is, as soon as the opposite contracting party has suspended payment, to say : " I will not wait until the time for fulfilment arrives in order to see whether, notwithstanding your suspension, you will fulfil your contract or not, but I will avail myself of the right which is given to me under this clause, to put an immediate end to the contract by immediately re-selling " or re-purchasing, as the case may be. As it seems to me, that is where the option lies ; because it is quite plain that an option is given. The clause says in the first sentence " at his discretion " ; and in the second sentence, " shall, after giving the notice, be entitled immediately to re-sell or re-purchase," and so forth. That is where the option lies. Where one party has suspended payment, the other party, if he likes, may let the contract run to its conclusion ; and may leave himself in the position of not knowing, until that time arrives, whether the contract will be fulfilled or whether it will not be fulfilled ; or he may take advantage of this clause, and under the contractual right which it gives, which is different from the common

law, he may say : " I will put an end to the contract here and now " : but in order to do that, he must give notice to the other party ; and he is only entitled to do that after giving notice to the party that is in breach. That may in many circumstances be a very valuable asset to the party who is not in default ; and the clause fixes the price which he has to pay, if he is going to avail himself of this, which, as I say, may be a very valuable asset. If he chooses to avail himself of his right to put an immediate end to the contract, upon the suspension of payment by the other party thereto, he can do it ; but he can do it upon the terms that, if he makes a profit by putting an end to the contract then and there, and fulfilling his requirement by further purchases in the market of paying into the liquidation for the benefit of the other creditors of the defaulting party the profit which he makes. That is my view of the meaning of this clause.

That being so, I do not think it is necessary to go into the various subsidiary points that have been raised in the discussion of the case. I think it is right, however, to refer to the case of *Sven Hylander & Co. v. Blake, Dobbs & Co (Incorporated)* (1). The case as it came before ROCHE, J., as he then was, did not raise the points which have been argued before me ; but the report contains the findings of the arbitrators in that case. The arbitrators, who were the appeal committee of the London Corn Trade Association, found the following findings. They found that :

on going into liquidation the sellers were in default and the buyers, on becoming aware of this, were entitled on giving notice to re-purchase against the sellers ; the default clause did not provide for cancellation in case of default, but a remedy by re-sale or re-purchase, after due notice.

I take some comfort from the fact that the interpretation that I am putting upon this clause appears to be the same as that which was put upon it by the appeal committee of the Corn Trade Association in that case.

Alternative award in favour of the respondents ordered to stand.

Solicitors : *Thomas Cooper & Co.* (for the claimants) ; *Andrew M. Jackson & Co.,* Hull (for the respondents).

[Reported by FRANK ROWE, ESQ, Barrister-at-Law.]

LONDON COUNTY FREEHOLD & LEASEHOLD
PROPERTIES, LTD. v. BERKELEY PROPERTY
AND INVESTMENT CO., LTD.

[COURT OF APPEAL (Slessor and Romer, L.JJ. and Eve, J.), June 9, 10,
11, July 7, 1936.]

Agency—Principal's liability for tort—Separation of representation and guilty knowledge—Communication in name of principal by innocent agent upon information from guilty agent.

Sale of land—Representation as to promptitude of payment of rents—Warranty.

Upon a draft agreement for the sale of certain blocks of flats the intending purchasers asked: "Are all the tenants' rents paid punctually and without dispute?" Reply was made upon the draft under the signature of one D., the managing director and solicitor to the vendor company: "There are no disputes and rents are paid promptly with very few immaterial exceptions." The reply had in fact been made by R., managing conveyancing clerk to D. in his professional capacity, on information obtained from A., property manager to the vendors. The representation as to the punctuality of rents was not incorporated in the agreement which was duly completed. In eleven cases the rents were not paid promptly. In an action by the purchasers for damages for fraudulent misrepresentation or alternatively for breach of warranty the learned judge found that there was no fraud, but he found that there had been a breach of warranty. On appeal:—

HELD: (i) in the absence of evidence that the parties entered into, or intended to enter into a collateral contract, there was no warranty of which there could be a breach.

(ii) the statement to R. by A. of that which was untrue to his knowledge, and the innocent use by R. of such untrue information to induce the purchasers to act to their detriment, amounted to fraudulent misrepresentation on the part of the vendor company.

[EDITORIAL NOTE.] It has been settled that the principle of responsibility is that the principal and agent are one, and if between them a misrepresentation is made it does not matter which of them made the representation or which of them possessed the guilty knowledge. The present case goes just a step further. The representation was made in the principal's name by an innocent agent upon information supplied by another agent who knew of the falsity of the information. It is held that in such circumstances the principal is liable to the person deceived.

FOR MISREPRESENTATION BY AGENT, see HALSBURY, Hailsham Edn., Vol. 1, pp. 289, 290, para. 475; and FOR CASES, see DIGEST, Vol. 1, pp. 610, 614, Nos. 2393–2426.]

Cases referred to:

- (1) *Dawsons, Ltd. v. Bonnin*, [1922] 2 A.C. 413; 29 Digest 309, 2553.
- (2) *Heilbut, Symons & Co. v. Buckleton*, [1913] A.C. 30; 35 Digest 54, 486.
- (3) *Morgan v. Griffith* (1871), L.R. 6 Exch. 70; 12 Digest 126, 840.
- (4) *Angell v. Duke* (1875), L.R. 10 Q.B. 174; 12 Digest 127, 844.
- (5) *De Lassalle v. Guildford*, [1901] 2 K.B. 215; 35 Digest 14, 79.
- (6) *Cornfoot v. Fowke* (1840), 6 M. & W. 358; 1 Digest 589, 2255.
- (7) *Barwick v. English Joint Stock Bank* (1867), L.R. 2 Exch. 259; 1 Digest 587, 2245.
- (8) *Ludgater v. Love* (1881), 44 L.T. 694; 1 Digest 589, 2254.

- (9) *Pearson (S.) & Son, Ltd. v. Dublin Corpn.*, [1907] A.C. 351 ; 35 Digest 15, 83.
- (10) *Harrison v. Knowles & Foster*, [1918] 1 K.B. 608 ; 35 Digest 53, 472.
- (11) *Lawrence v. Cassel*, [1930] 2 K.B. 83 ; Digest Supp.
- (12) *Crosse v. Gardner* (1688), Carth. 90 ; 39 Digest 419, 515.
- (13) *Lloyd v. Grace, Smith & Co.*, [1912] A.C. 716 ; 1 Digest 588, 2246.

APPEAL and CROSS-APPEAL from a decision of GODDARD, J., given on Dec. 5, 1935.

The action was brought by the plaintiffs, the present respondents, to recover damages for fraudulent misrepresentation and alternatively for breach of warranty in respect of the purchase by the plaintiffs from the defendants of four large blocks of flats in the West of London, viz., Clifton Court, Clive Court, Grove Court and St. John's Wood Court. At the hearing, GODDARD, J., found that there was no fraud, but that there had been a breach of warranty, and he awarded the plaintiffs £6,700 damages. The defendants appealed and asked that the judgment be set aside and that judgment be entered for them with costs. There was a cross-appeal in which the plaintiffs asked, in substance, that the finding of the learned judge as to fraud be reversed and that there be judgment for the plaintiffs on that issue for £21,453, with costs.

H. J. Wallington, K.C., and *Sylvester Gates* for the appellants.

Norman Birkett, K.C., and *H. G. Robertson* for the respondents.

Wallington, K.C.: The learned judge was wrong in finding that there was a warranty to the extent he said it existed, and he was wrong in finding there had been a breach if there was a warranty. The plaintiffs' solicitors asked: "Are all the tenants' rents paid punctually and without dispute?" The answer was: "There are no disputes and the rents are paid promptly with very few immaterial exceptions." The learned judge has found that that constitutes a warranty. The total rent-roll was over £80,000 a year, and the amount at which the plaintiffs put their annual loss of rent was something about one per cent. That was not a warranty at all, but merely a statement as to whether the rents were paid. Where there is an allegation of a collateral warranty, it cannot be made good unless the words used by one and understood by the other were contractual. Assuming the words to be a warranty, they are nothing more than a warranty as to the existing state of the tenants and the payment of their rents, and while it might be that the plaintiffs could draw an inference for themselves, there is no promise for the future at all. The evidence as to the way the words came to be written is inconsistent with any contractual intention.

Another point is whether a warranty could live after the execution of the conveyance. Was it not a simple contract which was merged in the conveyance? It had been submitted to the learned judge in the court below that this was so. [He referred to: *Heilbut, Symons & Co. v. Buckleton* (2); *Angell v. Duke* (4); *Morgan v. Griffith* (3);

De Lassalle v. Guildford (5); *Harrison v. Knowles & Foster* (10); *Lawrence v. Cassel* (11).]

H. G. Robertson, on the question of warranty : These flats were let, when rents were high, for periods of years extending up to 1942, at rentals which could not be obtained again. On the totality of the evidence, it was shown that the statement made by the defendants was intended to be a guarantee and not a statement merely given for information. The learned judge was entitled to find, as he did upon considering the whole of the evidence, that the statement made was intended to be a warranty, and was a warranty with the consequences which followed. [He referred to *Heilbut, Symons & Co. v. Buckleton* (2), *De Lassalle v. Guildford* (5) *Crosse v. Gardner* (12).]

Birkett, K.C., on the question of fraud : The statement about which I complain was untrue on the facts and the answer given ought not to have been made. The statement was false to the knowledge of the defendant company because it was false to the knowledge of Mr. Addis. It is not possible to believe that this answer was made other than fraudulently. The statement induced the contract. [He referred to the evidence.] There was overwhelming evidence on these matters which were so vital. The property manager knew the facts. The property manager knew that the financial superstructure was based upon the financial stability of the tenants and their ability to pay their rents. Every single ingredient of the act was present and the evidence is clear. It was the duty of the learned judge to find for the plaintiffs on the question of fraud. The price paid for the properties was £611,000. In effect, they were worth £20,000 less. All the facts went to show that the learned judge ought to have found on the issue of fraud in favour of the plaintiffs.

Wallington, K.C., in reply : The plaintiffs, in order to succeed on the question of fraud, must go so far as to say that the evidence showed that Mr. Addis had a dishonest mind in that he either knew that the answer was untrue, or that he did not care whether it was true or false and it has turned out to be false. The evidence does not justify that submission. Mr. Addis had nothing to gain. The plaintiffs were anxious to get the property. There is no evidence that Mr. Addis had a dishonest mind. The learned judge looked at the whole of the facts and considered the position in all its aspects. This court cannot interfere with the learned judge's finding on the question of fraud unless it comes to the conclusion that it is demonstrated that Mr. Addis had a dishonest mind when he passed this information. This is not in accordance with the evidence. If it is to be so held because there was a reckless disregard, it must be recklessness of a dishonest character. Further, Mr. Addis had no express authority to make a

fraudulent statement and he could have no implied authority. [He referred to *Lloyd v. Grace, Smith & Co.* (13).]

SLESSER, L.J.: In this case, the plaintiff company, who deal in landed property, sue the defendant company, the owners of a block of flats in St. John's Wood, London, for damages for fraudulent misrepresentation or breach of contract of warranty.

The history of the case is as follows: In 1932, the plaintiffs were considering the purchase of certain large blocks of flats in St. John's Wood from the defendants, and, for that purpose, wished to know what revenues in the form of rents arose from the possession of the flats. Accordingly they were furnished at various dates from Apr., 1932, with certain documents called schedules containing information as to the respective tenancies of four blocks—Clive Court, Grove Court, Clifton Court and St. John's Wood Court. These schedules contained the names of the tenants, the terms of lease and the rent per annum paid. The rent roll was shown in all to be £80,165 in respect of 416 flats. Three of the flats, two in Grove Court and one in Clifton Court were shown as vacant. The schedules were sent in two sets with further details as to the property, and, finally, on Nov. 25, 1932, the plaintiffs offered the sum of £611,000, subject to contract. On Nov. 30, 1932, Mr. A. C. N. Dixey, who was both solicitor for and managing director of the defendant company, sent to the plaintiffs' solicitors the draft contract. The schedules, though stating the amount of the rent, were silent on the question whether the rents were paid punctually and without dispute, and, therefore, before agreeing the draft, the plaintiff company thought it necessary specifically to ask the question which appears in red ink on the draft agreement: "Are all the tenants' rents paid punctually and without dispute?" to which the following reply was made which appears in green ink upon the draft agreement under the signature "A. C. N. Dixey," in the following words: "There are no disputes and rents are paid promptly with very few immaterial exceptions." It is by this representation that the plaintiffs contend that they were induced to purchase the flats. They aver that the representations were untrue to the knowledge of the defendant company and were made by the defendants fraudulently in order to induce the plaintiffs to make such purchase.

As regards the accuracy of the representations, the learned judge has found that in eleven cases the rents were not paid promptly and that, in all, the actual loss through failure of payment, put at its highest, would not have been more than £875 per year, and that the statement that the rents were paid punctually and without dispute was untrue, for in deciding, as he did, that there was a breach of a collateral warranty in the terms of the answers to the questions appearing on the draft

agreement—collateral, because the final agreement as executed contained no reference to the punctual payment of rents—he took the view that these eleven cases amounted to more than “very few immaterial exceptions” which was the only qualification contained in Mr. Dixey’s answer. In my opinion, the learned judge was right in coming to the conclusion that the loss of rent amounting to £875 less than would have been the rental value of the flats, if all the rents were punctually paid in the cases of the eleven flats, could not properly be described as “very few and immaterial”; that they may have been rightly said to be “very few” is arguable, and had those words alone been used the plaintiffs might have been put upon further enquiry to know their exact number, for the rents were high and a very few out of 416 might, nevertheless, have caused considerable loss of rental, but I find it impossible to regard the use of the word “immaterial” as anything but an assurance to the plaintiffs that, in calculating the value of the property, unpunctuality of rent and disputes might in practice be disregarded and the plaintiffs certainly so treated the answer, for having received this assurance, they proceeded to sign the contract and duly paid the £611,000, having themselves made certain allowances for what have been called “voids,” completion taking place on Dec. 21, 1932.

GODDARD, J., as I have said, has come to the conclusion that there was a collateral warranty as to the rentals of the flats which was broken, and on this head has given damages which he has assessed at £6,700. Against this judgment the defendants appeal. On the other hand, he has refused to find fraud, and on this issue there is a cross-appeal by the plaintiffs.

I proceed, therefore, first to deal with the question of collateral warranty. As was pointed out by VISCOUNT HALDANE in *Dawsons, Ltd. v. Bonnin* (1), the word “warranty” in English law has been used with many connotations. He says at p. 422:

The proper significance of the word in the law of England is an agreement which refers to the subject matter of a contract, but, not being an essential part of the contract either intrinsically or by agreement, is collateral to the main purpose of such a contract.

And it is with such a meaning that the word is used in the present case. To establish a collateral contract it is necessary to use the language of LORD MOULTON in *Heilbut, Symons & Co. v. Buckleton* (2), that the plaintiff must “show a warranty,” i.e., a contract collateral to the main contract.” In my opinion, the learned judge was wrong in finding such a collateral contract in the present case for the reason that there is no evidence that the parties ever entered or intended to enter into a collateral contract at all, or indeed any contract other than the direct agreement for the purchase and sale of the properties, and the answer to the question as to punctuality of rent was in my view never more

than a representation made in the course of negotiations in that contract of purchase and sale. No subsidiary or other contract was ever made between the parties at all. This is made clear not only by the absence of evidence of such agreement, but also by the positive statement of Mr. Cullen, the managing director of the plaintiff company, for, being asked, in relation to his question as to rents, the question "Supposing you had got an unsatisfactory answer to that question revealing the facts as we now know them, would you at that stage have entered into the contract?" he replied: "No, we should have made inquiries to see whether we should have proceeded at all." And again, he said: "If we had known the true facts, we should have had to consider very carefully—would only purchase on a reduced price, perhaps not at all." Nor does any other witness put the matter any higher.

It is instructive to contrast these answers which frankly state that the company might have purchased at a reduced price with the positive statements made in the cases where the courts have held a collateral contract on the evidence to exist. Thus, in *Morgan v. Griffith* (3), KELLY, C.B., at p. 73, says:

The plaintiff, unless the promise to destroy the rabbits had been given, would not have signed the lease.

He points out that this agreement was entirely collateral to the lease and founded on a good consideration. In *Angell v. Duke* (4), the defendant verbally promised the plaintiff that he would, after creation of a tenancy, do certain repairs, COCKBURN, C.J., pointing out that on the plaintiff objecting to the condition of the house the defendant said at p. 177:

If you will become my tenant I will undertake to put the house in repair, and send more furniture into it.

LUSH, J., at p. 178, said:

No obligation arose until the consideration had been executed by the plaintiff entering and becoming tenant.

And finally, in the well-known case in this court of *De Lassalle v. Guildford* (5), A. L. SMITH, M.R., in reading the judgment of the court, points out, at p. 219, that the plaintiff said:

I shall be prepared to exchange the counterpart for the lease . . . will you kindly inform me if the drains and all sanitary arrangements are in good order

and that the wife in her evidence stated:

I told the defendant that my husband before exchanging the agreement wanted a still further assurance as to the drains . . . he then said that he could give me his word for the perfect condition of the drains, that I need have no fear on the subject; and he repeated, "I will give you my word—will that satisfy you?" I said I could not but be satisfied with his word, and accepted it.

In the present case the learned judge in his judgment says that Mr. Wallington has agreed that what is relied upon is not incapable of being a warranty. By this, Mr. Wallington tells us that he meant no more than if there were evidence of a collateral contract it might amount to a warranty. In my view, as I have indicated, there is nothing to show that the parties in this case intended to make any collateral agreement. No suggestion is made that the execution of the principal agreement was to be a consideration for the collateral one, and, on Mr. Cullen's own view, it was no more than a representation which might or might not have induced him to go on with the purchase at a lower price. Neither he nor any other witness for the plaintiffs proved the existence of the secondary contract relied upon. It follows, in my opinion, that no such collateral contract could properly have been found by the learned judge, and that the appeal succeeds.

I now come to the question of the cross-appeal, the complaint against the refusal of the learned judge to find fraudulent misrepresentation. Now, in dealing with the question of collateral warranty the learned judge expressed the opinion, as I have pointed out, that the representation was untrue. He expressly discounts the view that the misstatements are immaterial exceptions and, further, he was of opinion that the plaintiffs were induced by the representation to act upon it to their detriment. In all these matters I agree with his opinion, but he has gone on to find that the misrepresentations were not fraudulent and consequently cannot support a claim for damages. It becomes necessary, therefore, closely to examine the reasons why he has come to this conclusion because, in ordinary circumstances, the fact that a judge observed the witnesses in the box is, particularly in the case of fraud, of very great weight. But I think that his finding has not the force it might otherwise have because, unfortunately, in this case, there has been a confusion with regard to the effect of the evidence on representation so that his reasons must be reconsidered. To clarify the matter it is essential that there be held a clear idea of the *dramatis personæ* and of the functions and activities of each of the material officials of the defendant company. Mr. Dixey, as I have indicated, occupied a double position, for he was both the managing director of the defendant company and its solicitor. In his capacity as managing director he had under him a property manager, one Mr. Addis, and below Mr. Addis was Mr. Purchase, the collector of rents and cashier. In his professional capacity as solicitor, Mr. Dixey was associated with another subordinate solicitor, Mr. De Rees, who was at all material times managing conveyancing clerk to Mr. Dixey and so acted in the matters we have here to consider. Before the trial, Mr. Addis was ill, and his evidence was therefore taken by commission on Mar. 12, 1935. Whether he had recovered by the date of the trial in Nov., 1935, I know

not, but at any rate he was not called upon to give any further evidence, and his only evidence so given on commission was read. At that time, it was believed by the plaintiffs that the representations relied on, being the answers on the draft agreement, were signed by Mr. Dixey himself, for it is his name which is attached to them and also in another place his initials. It was not until much later that it was known to the plaintiffs that, in fact, it was Mr. De Rees who signed the answers in Mr. Dixey's name and not Mr. Dixey himself. As a consequence, when Mr. Addis was cross-examined on commission he was asked whether he had been consulted by Mr. Dixey about the tenants of the flats, and he replied, in form truthfully, "Mr. Dixey had no information at all from me." It now appears that this was technically true, but that in reality Mr. Addis had been consulted by Mr. De Rees who, as Mr. Dixey's deputy, was preparing the agreements, and he told the judge that he had consulted Mr. Addis about this very question. His evidence is that when he consulted Mr. Addis, whether the tenants paid their rents punctually and promptly, Mr. Addis said there were no very serious cases, but suggested that Mr. De Rees should go to see Mr. Purchase, but he went on to say that Mr. Addis, after that, saw the contract, that the suggested answers were put to Mr. Addis and that he saw and approved the final reply. He repeated that Mr. Addis saw the answer he (De Rees) made—that is the answer which was sent to the plaintiffs' solicitors. On this the learned judge has said—Mr. Birkett contending that the judge should find that Mr. Addis was fraudulent, particularly because he denied that he saw the answer—that Mr. Addis may quite honestly have believed that he did not see the answer, the wording of which is that of Mr. De Rees, but, as I have pointed out, Mr. Addis was never questioned at all about the answers which Mr. De Rees brought him, which he approved. On the then knowledge of the plaintiffs he was merely asked whether he had given information to Mr. Dixey, and, answering by the card, said "No." Now, it appears from Mr. De Rees' own evidence that Mr. Addis did approve these statements and knew all about them, and I must express the view that, although, in a sense, he was not bound to answer what he was not asked, still, in failing to make any reference to Mr. De Rees he misled the plaintiffs and was at least practising what the casuists have called "an economy of the truth." Now, in fact it is admitted by Mr. Addis in cross-examination that, as to the eleven cases, when he approved the statement that the rents were paid punctually, he was stating or approving that which was untrue, and that these untrue statements were material is shown by the frank admissions of Mr. De Rees that if he had known what he now knows, that there was such default in eleven cases, he would not have made the answer. Mr. Dixey also says: "With my knowledge as I have it now, I would not have answered the question as I did"; that is,

had he been the answerer. He also agreed that he would expect the answers to be relied upon. On these facts the case resolves itself into one where the agent who made the representation to the plaintiffs believed it to be true at the time he made it ; that is the position of Mr. De Rees, but his informant, Mr. Addis, who was also an agent of the company, though he knew it to be untrue, did not make the representation to the plaintiffs, and the question arises in such a case : may the company in such circumstances be found liable in fraud, when the elements of the fraud have to be collected from different agents of the company ?

Certain of the earlier cases, notably *Cornfoot v. Fowke* (6), appear to favour the view that in such a case the fraudulent representation could not be imputed to a principal, but in *Barwick v. English Joint Stock Bank* (7), this decision was treated as doubtful by WILLES, J.—see also *Ludgater v. Love* (8)—and was finally disapproved by the House of Lords in 1907 in *Pearson (S). & Son, Ltd. v. Dublin Corpn.* (9), where, as was said by LORD LOREBURN, L.C., at p. 354 :

the principal and the agent are one, and it does not signify which of them made the incriminated statement or which of them possessed the guilty knowledge.

The EARL OF HALSBURY, at p. 357, commenting upon *Cornfoot v. Fowke* (6), says that if it were right :

the united principal and agent might commit fraud with impunity, [which] would be quite new to our jurisprudence.

He refers to the passage I have already mentioned in *Barwick's* case (7), where WILLES, J., further said that he thought that *Cornfoot's* case (6) was decided only on a point of pleading. For myself, I cannot see why if the physical act of several agents may collectively be deemed in law to be the joint responsibility of a principal, the same principle should not apply to states of mind. The agent and principal are in law one for the purpose of the acts which make up the fraudulent misrepresentation ; and equally the same considerations apply if, as here, both Mr. De Rees and Mr. Addis were servants of the same corporation and the ingredients of the fraud are all to be found in the acts of the agents of one principal. I think, therefore, that once it is held that Mr. Addis stated that which was untrue to his knowledge to Mr. De Rees and Mr. De Rees, albeit innocently, used that untrue material information to induce the plaintiff company to act to their detriment, the company may be said to have been guilty of fraudulent misrepresentation, and it matters not that one element in that wrong is to be traced to Mr. Addis and another element to Mr. De Rees.

There remains the question of damage. On this head it will be necessary that an inquiry shall be held. The damage will be the difference between £611,000 paid for the property and the amount which

the plaintiffs would have paid had they known the actual circumstances as to these eleven flats. The amount of damage must of course be taken to be as at the date of action brought. But in assessing the loss suffered in respect of each particular flat by the tribunal when considering that loss in relation to the diminution in the amount which the plaintiffs would have paid had they known the truth, actual subsequent facts which relieve the tribunal from the burden of estimating such facts may of course be regarded. The damage will not necessarily be limited to the financial condition of the flats at the time of action brought, but the further financial history of such flats is a factor which falls to be considered in arriving at an estimation of the damage. I would add, in deference to an argument addressed to us, that the circumstance that, in arriving at the £611,000, the purchasers used a formula which made percentage allowances for void flats is irrelevant to the inquiry and cannot be taken into account.

ROMER, L.J.: The facts of this case have been fully stated by SLESSER, L.J., and need not be repeated. Upon those facts two questions arise for decision, of which the first was decided by GODDARD, J., in the plaintiffs' favour and the second in favour of the defendants. The first—and this is the question arising upon the appeal—is whether the defendants ever warranted to the plaintiffs the truth of the representation made by Mr. De Rees that all the rents shown as payable by the tenants in the schedules furnished to the plaintiffs were paid promptly with very few immaterial exceptions. The second question—and this is the one which arises on the cross-appeal—is whether the representation was false to the knowledge of the defendant company.

That the representation was untrue cannot be denied. It was to the effect that the cases in which the rents were not paid promptly were very few and were immaterial. In view of the large number of tenancies specified in the four schedules it may be true to say that the cases were very few, for size is only relative, but it was untrue to say that they were immaterial, and this was admitted by the defendants' witnesses. Captain Dixey, who was the defendant company's managing director as well as their solicitor, agreed that the statement was untrue. Mr. De Rees, who was the person who actually made the statement, admitted in effect that had he known all the facts he would not have made it. In these circumstances it is plain that the plaintiffs could have obtained rescission of the contract for the purchase of the flats while it was still executory, for the misstatement was a material one, and was relied upon by the plaintiffs. The fact that it was material is necessarily involved in the fact that it was untrue, for the statement that the exceptions were immaterial must mean that they were immaterial from the point of view of the plaintiffs as the proposed

purchasers of the flats. The fact that it was relied upon by the plaintiffs sufficiently appears from the evidence of Mr. Cullen, and can hardly be denied. It was indeed suggested that the plaintiffs were in no way influenced by the representation, seeing that they had offered £611,000 for the property before ever the representation was made; but the offer was expressly made "subject to verification," and the question on the draft contract to which the misrepresentation was the answer was one of the attempts on the part of the plaintiffs to obtain the verification they sought. But, at the date of the issue of the action, the contract was no longer executory. The purchase had been completed. That being so, the plaintiffs cannot recover damages from the defendants unless they can show that the statement was made fraudulently or that the defendants warranted the truth of the statement. Now, the learned judge has held that the statement was not made fraudulently. In my opinion, if he was right in so holding, he should have directed judgment to be entered for the defendants. LORD MOULTON, when advising the House of Lords in *Heilbut, Symons & Co. v. Buckleton* (2) said, at p. 51:

It is, my Lords, of the greatest importance, in my opinion, that this House should maintain in its full integrity the principle that a person is not liable in damages for an innocent representation, no matter in what way or under what form the attack is made.

I do not doubt that a person can be made so liable if he warrants the truth of the representation, but it must be made abundantly clear by evidence that the warranty was in fact given. It is not permissible to infer such a warranty when the evidence does not plainly require it. To do so would be to disregard the principle to which LORD MOULTON referred. Turning to the evidence in the present case, I confess, with all respect to the learned judge, that I can find no trace of any such warranty having been asked for or given. What is meant by saying that the plaintiffs warranted the truth of the representation? Surely this, that the defendants contracted with the plaintiffs that, in the event of the representation turning out to be untrue, they would indemnify the plaintiffs against any loss which might thereby be occasioned to them. Certainly no such obligation was imposed on the defendants in the contract of sale and purchase as one would have expected had they intended to subject themselves to it. The plaintiffs, however, contend that the obligation was imposed by a collateral oral contract made in consideration of the plaintiffs entering into the contract of sale and purchase. But there is no evidence that any such oral contract was ever suggested on the part of the plaintiffs or agreed to on the part of the defendants. The word "warranty," or its equivalent, does not appear to have been mentioned. The court is, in truth, being asked to infer such a contract from the mere fact that the representation was one as to a matter of vital importance to the plaintiffs made during the

negotiations that culminated in the agreement for sale and purchase. In my opinion, the court should do no such thing. If a warranty is to be inferred in the present case, a warranty must, as it seems to me, be inferred in every case where a contract has been induced by a material representation. This would be to abrogate rather than to maintain LORD MOULTON'S principle. For these reasons I have come to the conclusion that the defendants' appeal should be allowed.

But I have also come to the conclusion that the cross-appeal of the plaintiffs should be allowed, for I think that the representation made by Mr. De Rees was untrue to the knowledge of the defendant company. It is quite plain that Mr. De Rees made the representation in all innocence, but he made it as agent for and on behalf of his principals, the defendant company, and they knew that the representation was false. Being a corporation, they could, of course, have no actual knowledge at all, but they must be deemed to have had the knowledge of their agents who normally dealt with questions arising between them and their tenants, and the true facts of the case must have been known to one or more of those agents. Captain Dixey and Mr. Addis, for instance, must have known between them that the statement was untrue, and the fact, if fact it be, that they did not know that the representation was being made is, in my judgment, immaterial. I say "if fact it be" because though Mr. De Rees has sworn that Mr. Addis saw his note that contained the representation, I do not think that Mr. Addis, who was examined on commission before the trial, had an opportunity of giving his recollection as to that matter. But even assuming that Mr. Addis did not see the note, the defendant company must be held to have made a fraudulent misrepresentation. There was at one time a difference of judicial opinion upon the question whether a representation made by an agent innocently on behalf of a principal can be treated as a fraudulent representation for which the principal is liable, when the principal, though having no knowledge that the representation is made, knows that it is untrue. But it has now been laid down by the House of Lords that in such a case the principal is as much liable as though he had himself made the representation knowing it to be untrue: *S. Pearson & Son, Ltd. v. Dublin Corpn.* (9). In that case it was said by LORD LOREBURN, L.C., at p. 354, that :

the principal and agent are one, and it does not signify which of them made the incriminated statement or which of them possessed the guilty knowledge.

In the present case the defendant company and Mr. De Rees are one. Mr. De Rees made a statement in all innocence, but such statement was untrue to the knowledge of the defendant company. The position at law is therefore the same as though the defendant company had made a fraudulent statement.

The cross-appeal must be allowed, and an inquiry directed as to the damages sustained by the plaintiffs.

EVE, J.: I agree with the conclusions arrived at by the other members of the court upon each of the two appeals. There is no evidence of any discussion or negotiations involving any contract between the parties other than the contract for sale and purchase come to on Dec. 15, 1932, and it is quite clear on the authorities cited in my Lord's judgment that the party relying on a contract collateral to the main contract—that is, a warranty—must establish the existence of that warranty by evidence. In the absence of such evidence the appeal of the defendants must succeed, and the award of the £6,700 as damages for breach of warranty be set aside.

The cross-appeal of the plaintiffs rests on the allegations to be found in paras. 4 and 6 of the statement of claim, and in particular on the written answer made on behalf of the defendants to an inquiry of an important nature written in red ink on the draft contract presented to the defendants for approval. The inquiry was: "Are all the tenants' rents paid punctually and without disputes?" and the answer was: "There are no disputes and rents are paid promptly with very few immaterial exceptions." The making of the representations, their untruth, and that they are of such a character as to be calculated to induce the plaintiffs to enter into the contract of Dec. 18, have all been proved or admitted, but the defendants insist, and the learned judge has held, that the representations were not made fraudulently in that they were not untrue to the knowledge of the defendants. Can this judgment be upheld? I think not. The defendants are a joint stock company acting and conducting business by a staff of officers and other agents whose duty it is in many departments to manage the company's business and to look after its affairs. What is the result of this state of affairs? The company and its agents must be regarded as one, and the former be deemed to have the knowledge of its agents in relation to the business. It is impossible to believe that there were not many of the agents who must have known of the relations subsisting between the defendants and their tenants, and I agree with the view of ROMER, L.J., that Captain Dixey and Mr. Addis must have known that the representations were untrue.

In my opinion, the cross-appeal succeeds, and an inquiry as to the damages sustained by the plaintiffs must be directed.

Order made:

The appeal and the cross-appeal succeed, but both without costs, the plaintiffs to have the costs of the trial below, and an inquiry to be ordered as to the damage caused by the fraudulent misrepresentation of the defendants, the costs of the inquiry to be reserved to the officer holding the inquiry.

Leave to appeal to the House of Lords.

Solicitors : *Cosmo Cran & Co.* (for the appellants); *Hyman Isaacs, Lewis & Mills* (for the respondents).

[*Reported by W. K. SCRIVENER, Esq., Barrister-at-Law.*]

BERESFORD v. ROYAL INSURANCE CO., LTD.

[KING'S BENCH DIVISION (Swift, J., and a special jury), **June 29, 30, July 1, 2, 13, 1936.**]

Insurance—Life assurance—Exception—Suicide “within one year from commencement of assurance”—Suicide nine years after issue—Public policy.

By a condition in an insurance policy issued in 1925 it was provided that: “If the life assured shall die by his own hand, whether sane or insane, within one year from the commencement of the assurance, the policy shall be void as against any person claiming the amount hereby assured or any part thereof.” The premiums were regularly paid upon the policy until 1934, when the assured committed suicide. It was found as a fact by a jury that the assured was sane at the time of his death. In an action upon the policy by the administratrix of the assured, the insurance company pleaded that as the assured died by his own hand, it was contrary to public policy that the insurance company should pay the sums assured:—

HELD: in the circumstances it was not contrary to public policy that the insurance company should pay the sums assured.

[EDITORIAL NOTE.] Apart from a special condition, a policy becomes void for reasons of public policy where the assured is guilty of felonious suicide. Where, however, there is a special exception in the case of suicide, it becomes necessary to construe the exception and to interpret the policy accordingly.

AS TO DEATH DUE TO ASSURED'S CRIMINAL ACT, see HALSBURY, Hailsham Edn., Vol. 18, pp. 519, 520, para. 817; and FOR CASES, see DIGEST, Vol. 29, pp. 366-369, Nos. 2945-2967.]

Cases referred to:

- (1) *Egerton v. Brownlow (Earl)* (1853), 4 H. L. Cas. 1; 12 Digest 240, 1971.
- (2) *Richardson v. Mellish* (1824), 2 Bing. 229; 12 Digest 242, 1977.
- (3) *James v. British General Insurance Co.*, [1927] 2 K.B. 311; Digest Supp.
- (4) *Tinline v. White Cross Insurance*, [1921] 3 K.B. 327; 29 Digest 408, 3214.
- (5) *Cleaver v. Mutual Reserve Fund Life Assocn.*, [1892] 1 Q.B. 147; 29 Digest 369, 2969.
- (6) *Printing & Numerical Registering Co. v. Sampson* (1875), L.R. 19 Eq. 462; 12 Digest 244, 1992.
- (7) *Amicable Society v. Bolland* (1830), 4 Bli. N.S. 194; 29 Digest 369, 2968.
- (8) *Horn v. Anglo-Australian & Universal Family Life Assurance Co.* (1861), 30 L.J.Ch. 511; 29 Digest 366, 2945.
- (9) *Besant v. Wood* (1879), 12 Ch. D. 605; 27 Digest 238, 2090.

ACTION by Mrs. Agnes Emily de la Poer Beresford, niece and administratrix of the late Major Charles William St. John Rowlandson, against the Royal Insurance Co., Ltd., for £42,469 1s. 10d., being £50,000 less loans, upon a policy of life assurance on the life of Major

Rowlandson. The facts and pleadings are fully set out in the judgment, *Sir William Jowitt, K.C.*, and *A. T. Denning* for the plaintiff.

Roland Oliver, K.C., *Harold L. Murphy, K.C.*, and *E. Ryder Richardson* for the defendants.

SWIFT, J. : By a number of policies of insurance issued by the defendant company to Charles William St. John Rowlandson in the year 1925, he became insured for £81,000, the event on the happening of which the sum assured was to become payable being the death of the life assured. It was stated in the insurance policies which formed the contract that :

unless it is otherwise provided in the schedule this policy is free from all restrictions as to residence travel and occupation and subject to endorsed conditions is indisputable.

The only condition to which my attention was called as being relevant was No. 4, which provides that :

If the life or any one of the lives assured shall die by his own hand, whether sane or insane, within one year from the commencement of the assurance, the policy shall be void as against any person claiming the amount hereby assured or any part thereof, except that it shall remain in force to the extent to which a *bona fide* interest for pecuniary consideration, or as a security for money, possessed or acquired by a third party before the date of such death, shall be established to the satisfaction of the directors.

From 1925 to 1932 Major Rowlandson paid the premiums on those policies with regularity, though not always with punctuality, but in 1932 he found it impossible to continue paying premiums on £81,000, and, by agreement between him and the company, the policies were reduced to £50,000. The conditions remained the same, the policies were still stated to be "indisputable," and condition 4 was not altered. In Aug., 1934, Major Rowlandson was financially hopelessly involved : he owed some £68,000 ; he had no money coming in. He could not pay the premiums which had become due on the policies in June, the date for payment of which had been extended (by days of grace) until July 16, and had then been extended (by arrangement with the company) until July 31, and then Aug. 3. On Aug. 3 the policies lapsed at 3 p.m. unless Major Rowlandson could find some £400, the amount of premium then due. He could not find the money. At three minutes to 3 he shot himself in a taxi-cab in St. James Street. After a long and careful inquiry a special jury has found as facts that at the time he shot himself he was not labouring under such a defect of reason from disease of mind as not to know the nature and quality of the act he was doing, or if he did know it that he did not know that he was doing what was wrong ; and they have also found that when he shot himself he possessed that degree of physical intellectual and moral control over his

actions which a normal man would possess. In other words, in the opinion of the jury, Major Rowlandson, judged by every standard either party or the court could suggest, was perfectly sane at the time that he committed suicide.

This action is brought by his administratrix against the insurance company really for the benefit of his creditors. At the time he died he owed £68,000, and, as far as I know, had not an asset in the world except such interest as he might still retain in the insurance policies. An administration order was made, and the action has since proceeded under the directions of the Chancery Division of this court. The plaintiff claims payment under the policies. The defending insurance company allege that the assured died by his own hand, whereby the said policies became void. By her reply the plaintiff admits that the deceased died by his own hand, but alleges in para. 3 of the reply that he was at the time insane and of unsound mind and not responsible for his actions. The plea raised in para. 3 of the reply completely disappears on the findings of the jury. I do not think that the plea raised in para. 4 of the defence, that the policies became void by the fact that the assured died by his own hand, is a good one. There is nothing in the terms of the contract contained in the policies to provide that they should be avoided on such an event, and I cannot find any justification in law for so holding. The defendants made no application to amend their pleading—had they done so I should have granted it—but throughout the trial they contended that if the deceased feloniously died by his own hand they were not liable, and after the verdict of the jury they contended before me that, as it was established that in fact the assured feloniously died by his own hand, public policy prevented them paying the assurance money to his estate and prevented his representative from recovering it, and the case has really been fought upon this plea, as though properly raised.

Now the court has to determine what is the position under a policy such as this, containing terms and conditions such as these, which has been in existence as long as this, where those who are to benefit are creditors of the deceased who died by his own felonious act. The defendant company say: "He died by his own hand when he was quite sane. It was a felonious act, therefore nobody claiming through him is entitled to benefit under the contract and it would be contrary to public policy that we should pay under our contract and the court ought not to compel us to pay." The plaintiff says: "Here is a contract legally made, which has been carried out by the assured for many years. It was a contract under which you undertook not to dispute your liability except upon one of the conditions in the schedule. None of the conditions in the schedule have been fulfilled, and it would be contrary to public policy to allow you to repudiate your contract." Both parties

are appealing to public policy, the defendants alleging that public policy forbids them honouring their contract, the plaintiffs alleging that public policy forbids the defendants repudiating their contract.

It seems to me that the first thing to be determined is what is the public policy to which both sides appeal and which the court should apply. The term "public policy" does not admit of any precise definition and is not easily explained. In *Egerton v. Earl Brownlow* (1) CRESSWELL, J., said at p. 87 :

I apprehend that when in our law-books or reports we find the expression, it is used somewhat inaccurately instead of "the policy of the law."

A good description of it is to be found in WHARTON'S LAW LEXICON (13th Edn., p. 699), where it is said to be

the principles under which the freedom of contract or private dealings is restricted by law for the good of the community.

At this time there are certain contracts and dealings which have long been regarded as contrary to public policy, and of course the courts recognise it as part of the law of the land and will refuse to enforce such contracts or countenance such dealings. But the doctrine has to be applied with very great care.

In *Richardson v. Mellish* (2), at p. 252, BURROUGH, J., said :

I, for one, protest, as my Lord has done, against arguing too strongly upon public policy ; it is a very unruly horse, and when once you get astride it you never know where it will carry you. It may lead you from the sound law. It is never argued at all but when other points fail.

And in *Egerton v. Earl Brownlow* (1) CROMPTON, J., said at p. 68 :

It seems to me extremely dangerous to limit the power of disposition on any general notion of impolicy, without some definite rule or principle being shown to apply to the case. The principle that no disposition could be allowed which might hold out a temptation to commit crime is clearly much too general to be supported. It would embrace almost every disposition and contract where a party is to expect a benefit from the death of another, nor can it be the true test whether impure or corrupt means may possibly be used.

The case of *James v. British General Insurance Co.* (3) was a case where :

A policy of insurance provided that the insurance company would indemnify the assured against all sums which he might be legally liable to pay for damages or compensation to any person for accidental bodily injury or accidental damage to property where such injury or damage was caused by the driving of the insured's motor car, including law costs when incurred with the consent of the company. While the insured was driving his motor car a collision took place between it and a motor cycle, the result being that the driver of the latter vehicle was injured, a passenger thereon was killed, and both vehicles were damaged. At the time of the collision the insured was drunk through his own unpremeditated folly. The insured

was convicted of the manslaughter of the deceased passenger. The injured driver brought an action for personal injuries against the insured, in which he was awarded damages and costs, and the insured incurred costs. The insured also incurred costs in repairing the vehicles, in attending an inquest on the deceased, and in defending himself in the police court proceedings before his trial. In an action by the insured against the company for indemnity against these damages and costs:—*Held*, that the policy covered liabilities of the insured for accidental bodily injury to any person or accidental damage to property caused by his negligence, even though gross and attended by criminal consequences, that the policy by covering these liabilities was not void as against public policy, and that the insured was entitled to the indemnity which he claimed.

ROCHE, J., said on pp. 320 and 321 :

It remains to deal with the defence of public policy. That, I think, raises a question of general importance, because if the contention of the present defendants is right it cuts at the root of a very large number of these motor insurances. I see no ground for asserting a principle of public policy which operates only against persons who drive when they are drunk. As I have suggested to counsel for the defendants during the course of his argument, the principle, if it is applicable at all, seems to be applicable to all persons who drive to the public danger. Moreover the principle affects many other cases besides those of motor insurance. It affects a very large number of workmen's compensation insurances where workmen are injured by acts or defaults, even though inadvertent on the part of the employers, which amount to breaches of the Factory Acts, such as neglect in the fencing of machinery and things of that sort. If the principle be right, that the mere fact that the assured has offended against the criminal law, however inadvertently, precludes him from recovering under a policy of indemnity, then indeed the results are very far reaching. Fortunately for myself the application of the principle in cases of this particular description has been the subject of express decision by a judge of great experience in matters of insurance law: BAILHACHE, J., in *Tinline v. White Cross Insurance Association* (4), to which I will refer again presently. In cases such as this, in which considerations of public policy arise, the rights and duties of judges are clear. They have to attend to matters of public policy. Any dispute about that, and there was apparently some dispute about it as late as 1853, was set at rest by the well known case of *Egerton v. Earl Brownlow* (1), where it was established that it is the duty and the right of the courts to refuse to enforce contracts or dispositions of property which are offensive and obnoxious to public policy. It is also true that long before the decision in that case that principle had been applied to matters of insurance.

ROCHE, J., then deals with another case to which I shall refer later, and he then goes on to say, at p. 322 :

It may further be stated that the circumstances in which public policy is applicable are of course subject to variation. The principles of public policy, which I suppose are only a branch of the principles of ethics, are themselves unchanging, but their applications may be infinitely various from time to time and from place to place. That, I think, was what BAILHACHE, J., was properly referring to when in *Tinline's* case (4), he said [at p. 331]: "LORD HALSBURY said that the law is not always logical, and every one concerned with the administration of the law knows this. If the law is not logical, public policy is even less logical." I prefer, however to say that the applications of public policy may be variable from time to

time and from place to place. Nevertheless if it is found at any time that the courts have adopted a settled rule for the application of public policy in any sphere, then I think it is the duty of the judges loyally to follow that rule.

It seems clear, then, that the doctrine of public policy is to be carefully watched and only to be enforced in cases in which the law regards a contract or its fulfilment as injurious to the community.

In *Richardson v. Mellish* (2), to which I have referred above, BEST, C.J., at pp. 242 and 243, said :

We have heard much of this being a contravention of public policy, and that, on that ground, it cannot be supported. I am not much disposed to yield to arguments of public policy : I think the courts of Westminster Hall (speaking with deference as an humble individual like myself ought to speak of the judgments of those who have gone before me) have gone much further than they were warranted in going in questions of policy : they have taken on themselves, sometimes, to decide doubtful questions of policy ; and they are always in danger of so doing, because courts of law look only at the particular case, and have not the means of bringing before them all those considerations which ought to enter into the judgment of those who decide on questions of policy. I therefore say, it is not a doubtful matter of policy that will decide this, or that will prevent the party from recovering :—if once you bring it to that, the plaintiff is entitled to recover ; and let that doubtful question of policy be settled by that high tribunal, namely, the legislature, which has the means of bringing before it all the considerations that bear on the question, and can settle it on its true and broad principles. I admit, that if it be clearly put upon the contravention of public policy, the plaintiff cannot succeed :—but it must be unquestionable—there must be no doubt : looking at all the facts of this case, I can see no unquestioned principle of policy that stands in the way of the plaintiff to hinder him recovering in this action.

With these observations upon public policy, which might be considerably extended, I turn to consider the doctrine as now advanced. The defendants having made a contract and having had the full benefit of it and being liable to pay upon it, because the fact upon which they agreed to pay has occurred, now say : “ It would be contrary to public policy for us to pay, because the creditors of a criminal would get the money, and so we shall keep the money ourselves.” Here I have a contract quite clear and definite in its terms which is to be undisputed save for certain exceptions in the schedule. Those exceptions have not arisen. The contract was legally made. It was properly performed by the assured. For many years he paid his premiums under it, and when the contract ends by the happening of the event upon which the insurance company become liable, namely, the death of the deceased, the only thing which remains to be done is for the insurance company to pay the money they had contracted to pay. The insurance company might have inserted in their policy a condition that they would not be liable in case of insane or felonious suicide whenever committed. They did not do so.

These policies are often used for commercial purposes ; people assured

borrow money on their policies, or deposit their policies as security, and the negotiable value of an assurance policy is obviously much less if it relieves the assurers from liability in case of suicide. It is to meet some such objection that clause 4 was invented. It tells whoever the policy may be offered to commercially, or whoever relies upon it as a provision for their future when the assured has gone, that the company will not pay in the case of suicide within 12 months, but it does not go on to hint in any form or shape that if the assured commits suicide after the 12 months the company cannot pay because it would be contrary to public policy for them to honour their contract. But when the policy falls due the company seek to raise the defence that the assured died by his own hand ; he was sane ; it was a felonious act ; it would be contrary to public policy to pay the money which, if he had died a natural death, would have been due.

In the case of *Cleaver v. Mutual Reserve Fund Life Association* (5), LORD ESHER, M.R., at p. 151, said :

In this case the executors of the will of James Maybrick in that capacity sue the defendants upon a policy of life insurance granted by them to the testator. James Maybrick is dead, and the defendants admit that during his lifetime they granted him the policy ; but they insist that they are not liable to pay the sum insured to his executors, because they would hold it in trust for the wife of James Maybrick, and his death was occasioned by the criminal act of his wife, that is to say, she murdered him. They say that it would be contrary to public policy that under such circumstances they should be compelled to pay this money to the plaintiffs, and therefore that public policy excuses them from that which would otherwise be the due fulfilment of their contract. No doubt there is a rule that, if a contract be made contrary to public policy, or if the performance of a contract would be contrary to public policy, performance cannot be enforced either at law or in equity ; but when people vouch that rule to excuse themselves from the performance of a contract, in respect of which they have received the full consideration, and when all that remains to be done under the contract is for them to pay money, the application of the rule ought to be narrowly watched and ought not to be carried a step further than the protection of the public requires.

I do not think the defendants' contention should prevail. Whilst I entirely agree that the law will not enforce a contract which is entered into in contemplation of a man committing a felonious act, I cannot see why, when a perfectly legal contract has been entered into and has been observed by the parties for many years, one party to it should escape the liability which falls upon him by alleging that the other has terminated it in an illegal manner, when he has stipulated as the consideration for the bargain being made that he will not dispute it except for particular reasons none of which have occurred. The question here is not whether or no it is contrary to public policy for a person to commit suicide, or to make a disposition or to enter into a contract which tempts or encourages to commission of suicide. Were such questions raised very different considerations might have to be applied ;

but here the only question is whether where a perfectly valid contract has been made it is contrary to public policy for the insurance company to discharge their liability under it because the assured has years after the making of the contract feloniously committed suicide.

In *Printing & Numerical Registering Co. v. Sampson* (6) SIR GEORGE JESSEL, M.R., said on p. 465 :

Now, it was said on the part of the defendant, that such a contract as that which I have mentioned, a contract by which an inventor agrees to sell what he may invent, or acquire a patent for before he has invented it, is against public policy, and it was said to be against public policy, because it would discourage inventions ; that if a man knows that he cannot obtain any pecuniary benefit from his invention, having already received the price for it, he will not invent, or if he does invent will keep it secret, and will not take out a patent. It must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because if there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by courts of justice. Therefore, you have this paramount public policy to consider—that you are not lightly to interfere with this freedom of contract. Now, there is no doubt public policy may say that a contract to commit a crime, or a contract to give a reward to another to commit a crime, is necessarily void. The decisions have gone further, and contracts to commit an immoral offence, or to give money or reward to another to commit an immoral offence, or to induce another to do something against the general rules of morality, though far more indefinite than the previous class, have always been held to be void. I should be sorry to extend the doctrine much further. I do not say there are no other cases to which it does apply ; but I should be sorry to extend it much further.

Mr. Roland Oliver, for the defendants, boldly relied upon the proposition that nobody could claim under a contract of insurance which had been terminated by the criminal act of the assured. In support of this contention he cited to me the case of *Fauntleroy (Amicable Society v. Bolland)* (7) . I am far from saying that that case, and of course I cannot say it, for it was a decision of the House of Lords, did not correctly express the view of the law as to public policy in 1830. But ideas as to what is good or bad for the community have altered considerably since those days. It is no longer public policy to hang a forger. Why should it be public policy now to prevent the innocent representatives of a criminal receiving the benefit of a legal contract which he has made and fully performed. How far *Fauntleroy's* case (7) really goes—or went in 1830—is I think questionable. In 1861 *WOOD, V.-C.*, held in *Horn v. Anglo-Australian & Universal Family Life Assurance Co.* (8), that there is no principle of public policy upon which a life assurance is void by the suicide of the assured while in a state of insanity. In the course of his judgment he said with reference to *Fauntleroy's* case (7) :

So the argument might be pursued—although I do not know that any case has so decided—to the same extent in the case of a person committing suicide while in a sane state of mind, thus committing a felony, and losing his life thereby.

I certainly do not read this as meaning that WOOD, V.-C., if he had had to decide such a case would necessarily have decided it as the defendants here contend for. Nobody disputes the proposition that a man cannot take advantage of his own wrong, but it seems to me that in these cases the question is not so much what has the deceased done, but what having regard to the legal contract he made in his life, which is not avoided by any of its terms by the manner of his death, are the liabilities and excuses from liability of the other party to that contract. Speaking with the greatest possible respect of the decision in *Fauntleroy's* case (7), I would ask what possible benefit can it be to the community that the representatives of a man hanged for murder should not be paid the money due under a policy which he had legitimately entered into and which apart from the doctrine of public policy the insurance company would be bound to pay. Is it to be said in 1936 that if a man who has entered into a contract of insurance and paid under it for years commits a murder and is hanged, it is to the benefit of the community that his dependents should receive nothing under that contract, and that, therefore, public policy prevents the insurance company from paying? It seems to me that in this respect the highest principle of public policy is that which regards the sanctity of contract. The dire threats as to the consequence of the number of assured persons who will commit suicide if this case goes against the assurance company leave me quite unmoved. The remedy is in the insurance companies' hands; they can always contract out of any liability for such an event, but if, for their own advantage, they do not so contract, they cannot in my opinion crave in aid the refuge of public policy.

In the course of this judgment I have used more than once the phrase "in my opinion." In using this language I shelter myself behind SIR GEORGE JESSEL, M.R., who, in *Besant v. Wood* (9), said, on p. 620 :

The suit raises points of the very greatest importance as regards the general law, upon which I can give my opinion—and I say my opinion advisedly, because I am free to confess that the law is not so clearly settled on the point that the judge can lay down the law; he can only give his opinion of the law. Judicial opinion has varied a great deal, and must vary a great deal, when you consider the ground upon which that judicial opinion or those judicial opinions have been founded. This is a branch of law which depends upon what is commonly called "public policy." Now you cannot lay down any definition of the term "public policy," or say it comprises such and such a proposition, and does not comprise such and such another: that must be, to a great extent, a matter of individual opinion, because what one man, or one judge, and perhaps I ought to say one woman also in this case, might think against public policy, another might think altogether excellent public policy. Consequently it is impossible to say what the opinion of a man or a judge might be as to what public policy is.

Having given this matter the best and most serious consideration I can, I am not satisfied that it is contrary to public policy that the insurance company should pay, having regard to all the circumstances on these particular policies. There will, therefore, be judgment for the plaintiff.

Solicitors: *Soames, Edwards & Jones* (for the plaintiff); *Sutton, Ommanney & Oliver* (for the defendants).

[Reported by C. ST. J. NICHOLSON, Esq., Barrister-at-Law.]

BROMILEY v. COLLINS.

[MANCHESTER SUMMER ASSIZES (Atkinson, J.), July 7, 1936.]

Master and Servant—Liability for accident—Voluntary assistance of servant by stranger—Common employment.

Certain employees of the defendant finding themselves unable to move a heavily laden trailer called for volunteers. The plaintiff, a lad of eighteen, volunteered and was injured by the shifting of the load. It was found as a fact that there was no immediate urgency for the removal of the trailer:—

HELD: if there was an implied request by the defendant, the volunteer could have no higher right than the servants of the defendant and was unable to recover by reason of the doctrine of common employment. If there was no implied request, he was a trespasser and could not recover. Although the plaintiff was invited to help, he was still a volunteer.

EDITORIAL NOTE. The doctrine of common employment has been criticised in recent times and the position here probably shows one of its harshest results. A person invited to assist in a difficulty places himself in the same position as a servant and becomes subject to the disabilities imposed by the doctrine.

AS TO VOLUNTARY ASSISTANCE GIVEN TO SERVANTS, see HALSBURY, 1st Edn., Vol. 20, Master and Servant, p. 134, para. 266; and FOR CASES, see DIGEST, Vol. 34, pp. 215-217, Nos. 1782-1789.]

Cases referred to:

- (1) *Degg v. Midland Ry. Co.* (1857), 1 H. & N. 773; 34 Digest 215, 1782.
- (2) *Potter v. Faulkner* (1861), 1 B. & S. 800; 34 Digest 216, 1783.
- (3) *Bass v. Hendon Urban District Council* (1912), 28 T.L.R. 317; 34 Digest 210, 1732.
- (4) *Hayward v. Drury Lane Theatre & Moss' Empires*, [1917] 2 K.B. 899; 34 Digest 216, 1787.
- (5) *Heasmer v. Pickfords, Ltd.* (1920), 36 T.L.R. 818; 34 Digest 217, 1789.

ACTION for damages for personal injuries suffered by John Bromiley through the negligence of Michael Albert Collins during the loading of a trailer at the Shepherd Cross Street fairground, Bolton, on Sept. 23, 1930.

The defendant was owner of a merry-go-round which had been erected on the Shepherd Cross Street fairground, Bolton, and which was being

dismantled and loaded on to a trailer on his instructions. The defendant's servants loaded the metal floor plates of the merry-go-round upon the off-side part of the trailer to a height of between 4 and 5 feet. Because they had so loaded it the men could not move the trailer and called for the help of bystanders, amongst them the plaintiff, a youth eighteen years old. The plaintiff rendered assistance by pulling a projection on the right-hand side of the trailer. The trailer moved three or four yards and then one of the front wheels encountered a hillock; this resulted in some of the iron plates falling off the trailer and severely injuring the plaintiff. His Lordship found as a fact that the request was made because the defendant's men found they could not move the trailer without help. He stated that he could not find on the evidence that there was any emergency of a kind which made the immediate removal of the trailer something of vital importance to the defendant.

William Gorman, K.C., and *Percy Butlin* for the plaintiff.

Denis Gerrard for the defendant.

ATKINSON, J.: [His Lordship stated the facts.] Assuming that the defendant's men were negligent in the handling of the trailer, is it possible to say that there is liability on the defendant for the accident? As the law stands I do not think that there is. The position seems to be that in cases where a man without invitation offers to help the servants of another and suffers injury while so doing, it is unquestionably established that he cannot be in a better position, as regards the employer, than the employer's other workmen. That has been laid down in several cases: *Degg v. Midland Ry. Co.* (1); *Potter v. Faulkner* (2); *Bass v. Hendon Urban District Council* (3).

In the case of *Hayward v. Drury Lane Theatre & Moss' Empires* (4), SCRUTTON, L.J., said it was hard to see how the doctrine of common employment could be applied in the absence of contractual relationship establishing service and where the persons in question were in fact volunteers. But, as MCCARDIE, J., pointed out in *Heasmer v. Pickfords, Ltd.* (5), the ratio may be criticised yet the principle remains.

In this case Bromiley did not thrust himself forward, he was invited to help; but, in my view that cannot make any difference at all. The person helping under circumstances of this kind is still a volunteer, helping in just the same way as if he had proffered his services.

As to whether he is in a better position than a servant, this is met by the dilemma which MCCARDIE, J., posed in *Heasmer v. Pickfords, Ltd.* (5). If he is a trespasser and there is some contractual relationship to be implied from the request, then if it was an unauthorised one, the position is the same as if there was none; and if it is an authorised request, you cannot imply that the authority is one to request people to

help on terms more favourable than those on which the man's own servants are working.

In that case MC.CARDIE, J., says at p. 820 :

I myself feel that the true explanation of *Degg's* case (1) and of *Potter v. Faulkner* (2), may be that a plaintiff who volunteers to assist the servants of another and who is injured by the negligence of those servants finds himself in a legal dilemma. For if he was engaged, or requested to help upon the authority of the master, then he becomes a fellow-servant with the other servants of the master. If, on the other hand, he was engaged or requested to help without any authority at all from the master, then he is, in legal strictness, a trespasser. This legal dilemma is, I feel, a regrettable infliction upon one who renders help through the instincts of courtesy or the dictates of kindness.

Bass v. Hendon Urban District Council (3) and *Heasmer v. Pickfords, Ltd.* (5) are in fact on all fours with the present case. It is with regret that I find there must be judgment for the defendants.

[His Lordship stated that in the event of his having found for the plaintiff he would have awarded £1,100, including special damage; he felt that Bromiley, although handicapped, would be a useful worker again.]

Solicitors: *F. Edwin Monks*, Manchester (for the plaintiff); *J. W. Fenoughty, Dunn & Co.*, Rotherham (for the defendant).

[Reported by M. D. CHORLTON, Barrister-at-Law.]

Re LONDON (HAMMERSMITH) HOUSING ORDER, APPLICATION OF LAND DEVELOPMENT, LTD. AND ANOTHER.

[KING'S BENCH DIVISION (Swift, J.), July 8, 1936.]

Public Health—Housing—Public local inquiry—Statements of counsel not supported by evidence—Future intentions of owners.

At a public local inquiry by the Minister of Health to consider the question of the confirmation of a compulsory purchase order in respect of a part of the White City, counsel for the owners of the land sought to state the intentions of his clients as to the future use of the property. He had already stated that he did not intend to call any evidence. The inspector refused to allow the statement to be made:—

HELD: the inspector was right in refusing to hear such a statement unsupported by evidence, and the complaint made afforded no ground for quashing the order.

[EDITORIAL NOTE.] The practice of a public local inquiry is not bound by the strict rules of court procedure, and no doubt statements by counsel or parties are often received although not supported by strict proof on oath. It is open, however, to the other side to object to any such relaxation of proper procedure, and if the inspector in the exercise of his discretion refuses to allow such a statement, there is no irregularity such as can vitiate the proceeding or the confirmation of the order based upon it.

AS TO ORDERS UNDER THE HOUSING ACT, 1925, see HALSBURY, Supp. to Vol. 23, Public Health, paras. 1034-1042, and FOR CASES, see DIGEST, Supp. Public Health, Nos. 481 a-506 d.]

APPEAL by the owners of the property used for exhibition purposes and known as the White City, Shepherd's Bush, London, against the decision of the Minister of Health, confirming an order made by the London County Council, whereby it was proposed to acquire by compulsory purchase an area of 50 acres of the said property for the purpose of a housing scheme. The facts and the question in dispute are stated in the judgment.

W. T. Monckton, K.C., and *H. A. Hill* for the applicants.

The Solicitor-General (Sir Terence O'Connor, K.C.), and *Valentine Holmes* for the respondent.

SWIFT, J. : On June 24, 1935, the London County Council made an order under the Housing Act, 1925, s. 64, which provides that a local authority may be authorised to purchase land compulsorily for the purpose of this part of the Act [Part III] by means of an order submitted to the Minister and confirmed by him in accordance with sched. 3 of the Act. The order which they made was an order to acquire compulsorily a portion of the land known as the White City. The owners of that land, Land Development, Ltd., and Shepherd's Bush Exhibition, Ltd., objected to the confirmation of the order made by the Minister on the ground that it was not in the public interest that the said land should be acquired by the London County Council, that the acquisition of the said land was unnecessary, that the said land was too valuable to be used for housing purposes, that the site was an ideal site for exhibition purposes and it was desirable that it should be continued to be used for those purposes, and that the acquisition of the part to be taken would seriously interfere with the use of the land not taken.

That objection having been taken, it became the duty of the Minister under the Housing Act, 1930, to order a local inquiry to be held, and he did order a local public inquiry to be held, and one of his inspectors—Mr. J. Greaves—presided, on Nov. 11, 1935, at the inquiry. Mr. Trustram Eve appeared on behalf of the London County Council and Mr. H. A. Hill appeared on behalf of the objectors, Land Development, Ltd., and Shepherd's Bush Exhibition, Ltd. The inquiry proceeded in the usual way. When it came to Mr. Hill's turn to address the inspector, he did so at considerable length. I do not say that he said one word too many. The case was one of considerable importance to his clients and this necessitated a lengthy debate as to the facts and to the position. The statement of Mr. Hill dealt at considerable length with the history of the land and he was going on to speak of what could be done with it in the future. He had said, quite early on, that he did not intend to call any evidence, that he was not going to put his clients or any other witnesses into the box, and he gave as his reason that it was not the wish of the directors to be cross-examined in public as to

their future plans. The inspector was faced with the position that counsel had made a statement of the history of the case and was going on to say what his clients would do with the land in the future, but he had said he did not intend to put them into the witness-box, lest they should be cross-examined. Mr. Trustram Eve objected. The inspector said: "I certainly rule that if you are not going to put your clients in the box, I am not going to listen to you as to what their intentions are." I am invited to say that this particular inspector on this particular occasion did something which was so contrary to natural justice as to vitiate the inquiry and to prevent the confirmation of the order by the Minister being a valid confirmation. I shall say nothing of the sort.

I lay down no particular law in this case as to what the inspector ought or ought not to do at an inquiry. We all know that he often hears a statement made by counsel and not supported by evidence and also by somebody not on oath. I have no reason to suppose that the method in which these inquiries have been conducted hitherto is likely to be altered in the future. In this particular case I can see nothing which this inspector did which could be said by anybody to be wrong. He listened to Mr. Hill with exemplary patience until the point arose when he was told: "I am now going to tell you of facts which depend upon my clients' intentions, but I am not going to call my clients to prove these intentions." Objection was taken. Then the inspector went further, in his desire to help Mr. Hill's clients. Both Mr. Trustram Eve (representing the London County Council) and the inspector said: "Well, if the difficulty is"—and apparently what was said amounted to it—"that you do not want the cross-examination in public, we will, when the public inquiry is over"—which is the only thing the Minister can hold—"have another private inquiry, either to-day, or at some future time, if we have to get the authority of the Minister to hold such an inquiry. There shall be a private inquiry, at which your clients shall give evidence properly, if the Minister orders it. At any rate, we will take it at that."

I think the inspector and the London County Council both went as far as anybody could be expected to go in order to try to assist and smooth over the difficulties which Mr. Hill foresaw for his clients. It was of no avail, and Mr. Hill terminated his remarks, saying: "Well, if I cannot say what my clients intentions are, if I cannot say what my clients are going to do, although I have told you that I am not going to call my clients, you can do what you like." The inspector reported and the Minister confirmed the order. Mr. Hill's clients now come to this court and say that they are persons aggrieved by the order, and that it is an order which should be quashed, on the ground that no proper inquiry has been held because Mr. Hill's speech was not allowed to progress to its legitimate or illegitimate conclusion. I am asked to say

that this inquiry was not an inquiry at all and that there has been no inquiry. I cannot forget that the court must have regard in this matter to the direction that the court, if satisfied upon the hearing of the application that the interests of the applicant may be substantially prejudiced by the requirements of the Act not being complied with, may quash the order, either generally or so far as it affects the property of the applicant. It is, however, difficult for me to imagine that the interests of the applicants have been prejudicially affected by the failure to hold an inquiry, or failure to hold a proper inquiry. If ever there was a case in which the failure to hold a public inquiry did not affect prejudicially the applicants, it was this case. I am satisfied that there was a proper public inquiry. There was nothing here of which applicants have anything to complain. This appeal will be dismissed with costs.

Solicitors: *Tatham, Obelin & Nash* (for the applicants); *Solicitor to the Ministry of Health* (for the respondent).

[Reported by W. K. SCRIVENER, ESQ., *Barrister-at-Law*.]

CRAVEN-ELLIS v. CANONS, LTD.

[COURT OF APPEAL (Greer and Greene, L.JJ., and Talbot, J.), **May 26, 27, 28, July 6, 1936.**]

Contract—Implied contract—Quantum meruit—Work done under contract not binding upon parties—Whether inference of fact or inference imposed by rule of law.

In 1927 the plaintiff, an estate agent, was employed by W. E., Ltd., for a term of three years in connection with the development of a certain estate. On Apr. 15, 1928, a company was formed, which purchased the estate, and the plaintiff and certain others were appointed directors of the company. Without express agreement between the company and the plaintiff, the plaintiff continued his work in connection with the estate and the company received and accepted the services rendered. After acting for two months, none of the directors having acquired the necessary qualifications as set out in the articles of the company, they all became incapable of acting as directors. On Apr. 14, 1931, an agreement was executed under the seal of the company, affixed by resolution of the unqualified directors, purporting to be between the company and the plaintiff, stating the terms on which the plaintiff was to act as managing director of the company. The plaintiff performed the services mentioned in the agreement. In an action to recover the remuneration set out in the agreement or alternatively for his services on a *quantum meruit*:—

HELD: (i) up to Apr. 14, 1931, the services were rendered by the plaintiff not as a director, but as an estate agent, and there being no contract, the plaintiff could recover on a *quantum meruit* for services rendered and accepted.

(ii) the agreement of Apr. 4, 1931, was a nullity, and the plaintiff could recover on a *quantum meruit* for services rendered and accepted

after that date, notwithstanding that the parties supposed that there was an agreement in existence.

[EDITORIAL NOTE.] In this case the basis of the doctrine of *quantum meruit* is carefully considered. The right to proceed with a claim for *quantum meruit* does not arise out of the original contract, nor is it an inference of fact based on the acceptance of services or goods based on what was thought to be a binding contract. The true basis of the claim is an inference of law where work has been done or goods supplied under what purports to be a binding contract but is not so in fact.

FOR THE LAW ON THE POINT, see HALSBURY, Hailsham Edn., Vol. 7, p. 231, para. 317; and FOR CASES, see DIGEST, Vol. 12, pp. 115-117, Nos. 752-765.]

Cases referred to :

- (1) *Re Allison, Johnson & Foster, Ltd., Ex p. Birkenshaw*, [1904] 2 K.B. 327; 10 Digest 992, 6875.
- (2) *Prickett v. Badger* (1856), 1 C.B.N.S. 296; 1 Digest 509, 1754.
- (3) *Clarke v. Cuckfield Union Guardians* (1852), Bail Ct. Cas. 81; 13 Digest 393, 1184.
- (4) *Lawford v. Billericay Rural District Council*, [1903] 1 K.B. 772; 13 Digest 394, 1193.
- (5) *Nicholson v. Bradfield Union* (1866), L.R. 1 Q.B. 620; 13 Digest 393, 1185.
- (6) *Clay v. Yates* (1856), 1 H. & N. 73; 12 Digest 240, 1967.
- (7) *Taylor v. Caldwell* (1863), 3 B. & S. 826; 12 Digest 618, 5102.
- (8) *Dawson v. African Consolidated Land & Trading Co.*, [1898] 1 Ch. 6; 9 Digest 433, 2823.
- (9) *Armstrong v. Lewis* (1834), 2 Cr. & M. 274; 12 Digest 269, 2206.
- (10) *Scarisbrick v. Parkinson* (1869), 20 L.T. 175; 12 Digest 166, 1214.
- (11) *Re Bodega Co., Ltd.*, [1904] 1 Ch. 276; 12 Digest 216, 1762.
- (12) *Royal British Bank v. Turquand* (1856), 6 E. & B. 327; 9 Digest 97, 406.
- (13) *Channel Collieries Trust, Ltd. v. Dover, St. Margaret's & Martin Mill Light Railway Co.*, [1914] 2 Ch. 506; 10 Digest 1147, 8118.
- (14) *Britain v. Rossiter* (1879), 11 Q.B.D. 123; 12 Digest 123, 810.
- (15) *Young & Co. v. Royal Leamington Spa Corpn.*, [1883] App. Cas. 517; 13 Digest 384, 1126.
- (16) *Munro v. Butt* (1858), 8 E. & B. 738; 12 Digest 433, 3512.
- (17) *Smith v. Lindo* (1858), 5 C.B.N.S. 587; 12 Digest 270, 2209.
- (18) *Re Mahmoud & Ispahani*, [1921] 2 K.B. 716; 2 Digest 271, 2220.

APPEAL by William Craven-Ellis from a decision of GODDARD, J., given on Oct. 30, 1935, dismissing a claim for the remuneration set out in an agreement of Apr. 14, 1931, or alternatively, for remuneration in respect of services rendered in connection with the development of Canons Park Estate, Edgware. The facts are fully set out in the judgment of GREER, L.J.

D. N. Pritt, K.C., and *Valentine Holmes* for the appellant.

R. P. Croom-Johnson, K.C., and *R. A. Willes* for the respondents.

Pritt, K.C.: The defendant company was registered on Aug. 15, 1928. Up to that date, Mr. Craven-Ellis had worked in connection with the estates and he continued to do so afterwards. It was obviously intended by all concerned that he should enter into a new agreement with Canons, Ltd., but it took nearly three years before any new arrange-

ment was made. The date of the agreement which was strictly in question in this action is Apr. 14, 1931.

GREER, L.J. : Is it right to say that, at the material times, there were no qualified directors ?

Pritt, K.C. : Except for the first two months.

The defendants said that it was a meaningless agreement and unenforceable. The learned judge has put it a little differently. He has said that it was a perfectly good agreement when it was made, but as Mr. Craven-Ellis had not the qualification shares and did not get them, he was being employed to act as a managing director when disqualified. Consequently he could not sue because the employment was unlawful. Further, he could not sue upon a *quantum meruit*. The defendants purported in terms to appoint Mr. Craven-Ellis the managing director, but no mention of remuneration was contained in the minutes. The agreement provides for a remuneration of 25 per cent. of the profits. The duties were specified but were duties which could be carried out by a person who was not the managing director, provided he had the authority of the board. After he became disqualified from being a director, the company could have given notice, in writing, terminating the agreement.

It is said that Mr. Craven-Ellis has failed to comply with the Companies Act, 1908, s. 73, and consequently the office of managing director was vacated by him and accordingly the agreement of Apr. 14, 1931, ceased to be operative. Mr. Craven-Ellis claims to be paid the remuneration proper to be received by an estate agent for the sort of work he has done. It was set out in that way because it was said by the respondents he could not recover under the agreement. The appellant also claimed, in the alternative, under the agreement.

“ Acting as a director ” can only mean doing the work of a director at a board meeting, or doing work which has been delegated by the board and it must be the work of a director. Mr. Craven-Ellis’ position, when working for the company, was that of an estate developer and manager. He was doing something which was perfectly valid for which the company received the whole of the value stipulated for. The whole contract, and the performance of the contract, from beginning to end, was perfectly lawful. The legal position is that when the law attaches a penalty to the doing of something, it is a matter of construction, in all the circumstances, as to whether it was intended by the legislature to make the act unlawful or merely to make it expensive. The agreement between Mr. Craven-Ellis and the company was not illegal and the activity he performed was a lawful activity, although a penalty was attached. We ask the court to say that the contract ought to stand, but alternatively, we ask for remuneration on a *quantum meruit*.

There is also a plea of estoppel. At all material times all the shareholders knew that the plaintiff had no shares in the company. They took advantage of his services and are therefore estopped from saying that they ought not to pay for those services. The learned judge pointed out that persons cannot be estopped from pointing out illegality. There is no reason, however, why the company should not be held to its bargain. [He referred to *Taylor v. Caldwell* (7), *Dawson v. African Consolidated Land & Trading Co.* (8), *Armstrong v. Lewis* (9), *Scarisbrick v. Parkinson* (10), *Re Bodega Co., Ltd.* (11), *Re Allison, Johnson & Foster, Ltd., Ex p. Birkenshaw* (1).]

Croom-Johnson, K.C. : In all the questions which have been argued we come back to the difficulty that there was nobody, at any material time, who could act for the company, who could acquire knowledge for the company, who could receive notices for the company, who could make requests for the company, or who could enter into any contract either express or implied. The true position is that Mr. Craven-Ellis must be approached on the basis that he was not a shareholder in the company and, consequently, he was not a director of the company, and he could never be appointed as managing director, in the peculiar circumstances of this case. There is an express statutory prohibition against an individual acting as a director when not qualified to do so. In such circumstances, a director is not entitled to recover remuneration for any services rendered to the company. That was not confined to his inability to recover director's fees in the narrow sense of the term. The contract is bad because the whole implication of the contract is that Mr. Craven-Ellis shall continue to act as a director of the company. It matters not that he could have done some of this work even if he had not been a managing director. There is no possibility of dividing the duties under the agreement. They were all duties which have been stipulated for because the parties were all intending to appoint a managing director. There can be nothing in the nature of a *quantum meruit*. Supposing there is no contract, the parties cannot be estopped from pleading illegality and there is no room for estoppel. Another point taken is that the contract is severable, but there is no question of severability as the contract was to employ a managing director. [He referred to : *Royal British Bank v. Turquand* (12), *Channel Collieries Trust Ltd. v. Dover, St. Margaret's and Martin Mill Light Railway Co.* (13), *Scarisbrick v. Parkinson* (10), *Britain v. Rossiter* (14), *Young & Co. v. Royal Leamington Spa Corpn.* (15), *Munro v. Butt* (16), *Lawford v. Billericay Rural District Council* (4).]

Willes, following on the same side : The defendant company denies liability to pay for any services rendered since Mar. 1, 1931, because the services were rendered by the plaintiff in the belief, and were accepted by the defendant company in the belief, that the plaintiff was lawfully

discharging his duty as a managing director. The foundation for the existence of the contract involves a matter about which the parties are not allowed to be ignorant. That which is prohibited by Act of Parliament cannot be the basis of an action at law. If the parties have tried to make a contract and failed, there is room for a *quantum meruit*. But if there is a contract of an unlawful nature, there is no room for a *quantum meruit*. In the present case, a contract exists, and that destroys the possibility of a *quantum meruit*. The contract cannot be sued upon because it was unlawful. [He referred to : *Smith v. Lindo* (17), *Re Mahmoud & Ispahani* (18), *Lawford v. Billericay Rural District Council* (4).]

Valentine Holles, in reply : The respondents say that the Companies Act invalidates the contract because Mr. Craven-Ellis knew that there were no qualified directors. The answer to that is very simple, namely, that he did not know. The acts done by Mr. Craven-Ellis were not acts done by him as a director, but he was doing work as an estate agent, even though he was doing it for the company. In any event, the Companies Act contains no express prohibition of the doing of the acts of a director by a person who is not a director. If the principle of severability is applicable, the contract can be divided.

With regard to a *quantum meruit*, if one does work for another in the belief that it is done under a contract and it is discovered afterwards that no such contract exists, there is no rule of law that the work need not be paid for. An implied request arises in the absence of an express request. Is not the acceptance of the work sufficient to justify the presumption that it was requested ? In the present case there can be no answer to a claim on a *quantum meruit*.

GREER, L.J. : In the year 1927, Sir Arthur du Cros and his son Phillip became interested in the development of a building estate known as Canons Park Estate. They desired to have the benefit of the plaintiff's skill and experience as an estate agent in the development of the estate. For a time the estate was vested in a company called the Pard Estates, Ltd. On Nov. 11, 1927, the plaintiff wrote to Mr. Phillip du Cros, and on Nov. 29 to Sir Arthur du Cros, stating the terms on which he would be willing to give them the benefit of his skill and experience. On Nov. 30 the plaintiff wrote to Sir Arthur du Cros stating revised terms on which his firm would act as managers of the Canons Park Estate. Subject to some modification, to which the plaintiff agreed, Sir Arthur du Cros agreed to these terms on behalf of the Pard Estates, Ltd., the engagement to be for three years. On Aug. 15, 1928, Canons, Ltd., was formed to purchase from the Pard Estates, Ltd., the Canons Park Estate. It then became impossible for the plaintiff to go on working for the Pard Estates, Ltd., as that company had sold the property, but the plaintiff

continued to do the same work for the new company. This company for the time being did not make any contract to employ the plaintiff or his firm on the terms formerly arranged, but without any express agreement they received and accepted the services he was rendering. The signatories to the memorandum and articles, being entitled to elect the first directors, nominated Mr. Phillip du Cros, the plaintiff, and Mr. A. W. Wheeler as the first directors on Aug. 15, 1928, and on Aug. 23 the directors co-opted Sir Arthur du Cros as a director. Under the articles these directors could act without qualification for two months, but after that time they became incapable of acting as directors as none of them had acquired the necessary qualification. The only issued shares of the company were in the two signatories to the memorandum, but there is little room for doubt that these gentlemen were nominees of the du Cros'. Be this as it may, it is clear that on the expiration of the two months, the directors having no qualification ceased to be directors and were unable to bind the company except as *de facto* directors by agreements with outsiders or with shareholders. But all the directors must be taken to have known the facts. They became liable to penalties for acting as directors under the provisions of the Companies Act, 1908, s. 74. On Apr. 14, 1931, an agreement was executed under the seal of the company, purporting to be between the company and the plaintiff, stating the terms on which he was to act as managing director of the company. The seal was so affixed by resolution of the unqualified directors. The plaintiff in this action sought to recover from the defendant company the remuneration set out in the agreement, and as an alternative, sought to recover for his services on a *quantum meruit*. Until the company purported to put an end to his engagement he continued to perform all the services mentioned in the agreement. The company, having had the full benefit of these services, decline to pay either under the agreement or on the basis of a *quantum meruit*. Their defence to the action is a purely technical defence, and if it succeeds Messrs. du Cros, as the principal shareholders in the company, and the company would be in the position of having received and accepted valuable services and refusing, for purely technical reasons, to pay for them.

As regards the services rendered between Dec. 31, 1930, and Apr. 14, 1931, there is, in my judgment, no defence to the claim. These services were rendered by the plaintiff not as managing director or as a director, but as an estate agent, and there was no contract in existence which could present any obstacle to a claim based on a *quantum meruit* for services rendered and accepted.

As regards the plaintiff's services after the date of the contract, I think the plaintiff is also entitled to succeed. The contract, having been made by directors who had no authority to make it with one of themselves,

who had notice of their want of authority, was not binding on either party. It was, in fact, a nullity, and presents no obstacle to the implied promise to pay on a *quantum meruit* basis which arises from the performance of the services and the implied acceptance of the same by the company. It was contended by Mr. Croom-Johnson on behalf of the respondents that, inasmuch as the services relied on were purported to be done by the plaintiff under what he and the directors thought was a binding contract, there could be no legal obligation on the defendants on a *quantum meruit* claim. The only one of the numerous authorities cited by Mr. Croom-Johnson that appears to support his contention is the judgment of a divisional court in the case of *Re Allison, Johnson & Foster, Ltd., Ex p. Birkenshaw* (1). The court consisted of LORD ALVERSTONE, WILLS and KENNEDY, JJ., and the judgment was delivered by KENNEDY, J. In giving judgment that learned judge, expressing not merely his own opinion, but that of the other two judges, said at p. 330 :

There can be no implied contract for payment arising out of acceptance of the work done where the work was done upon an express request which turns out to be no request at all, but which down to the time when the whole of the work had been done was supposed by both parties to be valid and operative.

This passage appears to involve the proposition that in all cases where parties suppose there is an agreement in existence and one of them has performed services, or delivered goods in pursuance of the suppositious agreement, there cannot be any inference of any promise by the person accepting the services or the goods to pay on the basis of a *quantum meruit*. This would certainly be strictly logical if the inference of a promise to pay on a *quantum meruit* basis were an inference of fact based on the acceptance of the services or of the goods delivered under what was supposed to be an existing contract, but in my judgment the inference is not one of fact, but is an inference which a rule of law imposes on the parties where work has been done or goods have been delivered under what purports to be a binding contract, but is not so in fact.

In *Prickett v. Badger* (2), the question whether an obligation to pay on a *quantum meruit* basis depended upon an inference of fact from the conduct of the parties was negatived, and such inference was stated to be one that the law imposed on the person accepting the services. In that case the services of the agent had been performed in accordance with an express contract which entitled him to $1\frac{1}{2}$ per cent., and it was impossible to infer from the evidence that by accepting those services the defendant had by conduct promised to pay for them on the basis of a *quantum meruit*, but it was held that the contract to pay what was reasonable was a contract implied by the law, and not a question of fact to be determined by a jury. In the course of the argument CROWDER, J., said : " All the work done here was done under the special contract " ; but the court held that, notwithstanding that the work

was so done and accepted, there was as a matter of law an implied contract to pay a reasonable price therefor. In giving judgment, both WILLIAMS, J., and CROWDER, J., speak of the obligation to pay as founded on a promise implied by law. The decisions in *Clarke v. Cuckfield Union Guardians* (3) and *Lawford v. Billericay Rural District Council* (4), are also authorities to the effect that the implied obligation to pay is an obligation imposed by law, and not an inference of fact, arising from the performance and acceptance of services. In the last mentioned case the work in respect of which the plaintiff sued was done in pursuance of express instructions given by the defendant council, but was not binding on the defendants because no agreement had been executed under their seal. It was impossible to say as a matter of logical inference from the facts that by accepting the advantage of the plaintiff's work they had promised to pay him a reasonable sum therefor. Both parties assumed that there was a contract between them, and the acceptance of the work by the defendants could not in fact give rise to the inference of a promise to pay the reasonable value. For these reasons this case seems to me to show that the obligation is one which is imposed by law in all cases where the acts are purported to be done on the faith of an agreement which is supposed to be but is not a binding contract between the parties. VAUGHAN WILLIAMS, L.J., in the course of his judgment referred to *Nicholson v. Bradfield Union* (5), and said that the ground of the decision in that case, as he understood it, was that the law raised an implied contract by the corporate body to pay for the goods in question in that case. In my judgment, the obligation to pay reasonable remuneration for the work done when there is no binding contract between the parties is imposed by a rule of law, and not by an inference of fact arising from the acceptance of service or goods. It is one of the cases referred to in books on contracts as obligations arising *quasi ex contractu*, of which a well known instance is claims based on money had and received. Although I do not hold that the decision of the court in *Ex p. Birkenshaw* (1) was wrong, I think that the passage I read from the judgment is not a correct statement of the law.

I accordingly think that the defendants must pay on the basis of a *quantum meruit* not only for the services rendered after Dec. 31, 1930, and before the date of the invalid agreement, but also for the services after that date. I think the appeal should be allowed, and judgment given for such a sum as shall be found to be due on the basis of a *quantum meruit* in respect of all services rendered by the plaintiff to the company until he was dismissed. The defendants seem to me to be in a dilemma. If the contract was an effective contract by the company, they would be bound to pay the remuneration provided for in the contract. If, on the other hand, the contract was a nullity and not binding either on the plaintiff or the defendants, there would be nothing to prevent the infer-

ence which the law draws from the performance by the plaintiff of services to the company, and the company's acceptance of such services, which, if they had not been preformed by the plaintiff, they would have had to get some other agent to carry out.

The appeal will be allowed, with costs here and below. There must be, of course, some kind of reference to ascertain the amount.

GREENE, L.J. : In my opinion, the agreement of Apr. 4, 1931, in so far as it purports to appoint the plaintiff managing director of the company, was altogether void. The only power which is given to the directors to appoint a managing director is a power to appoint one of their number, that is to say, a person who is a director. The appointment as managing director of a person not a director would have been *ultra vires* a properly constituted board, and the circumstance that both such a board and the appointee thought that the appointee was a director would not, in my judgment, affect the matter. If this view be right, the position is not made any better by Table A, clause 94, or by the Companies Act, 1929, s. 143, since those provisions (assuming that they would otherwise apply) do not empower a *de facto* board to do what a *de jure* board is incapable of doing.

There is also, I think, another ground for saying that the contract is void. At the date when it was executed, both parties believed that the plaintiff was a director and was capable of continuing to act as a director. This belief was essential to the making of the agreement and formed the basis upon which the parties purported to contract. The agreement was accordingly void *ab initio* on well recognised principles. I may quote as an accurate statement of the law a passage on p. 296 of SALMON & WINFIELD'S PRINCIPLES OF THE LAW OF CONTRACTS :

The contract was entered into under a mistake as to the present existence of an essential fact recognised by the law as the foundation of the contract, and by its non-existence the contract is invalidated accordingly.

It was argued that the agreement is severable, and that the acts to be performed under it by the plaintiff could be looked upon as merely managerial acts disassociated from his assumed position as director. I am unable to take this view. A managing director is in a very different position to that of a mere manager since he is able to attend and vote at meetings of the board, and from the point of view of the company it was of importance that the person managing its affairs should be in a position to do this. The plaintiff's claim, therefore, in so far as it relates to services rendered after the date of the agreement can only succeed upon the basis of a *quantum meruit*. It was argued, first, that in the present case the agreement was illegal and not void, and, secondly, that no claim on a *quantum meruit* can be made where there is a contract which is in fact illegal and not void. I will assume that this second

argument is correct even in a case where the party who performs services under the contract is unaware of its illegality. (See, however, *Clay v. Yates* (6).) The argument as to the illegality of the contract was based upon the Companies Act, 1929, s. 141 (5). It was said that the *de facto* directors were guilty of an illegal act in affixing the company's seal to the contract, and further that in so far as the contract (it is said) must be read as containing an implied agreement by the plaintiff to act as a director, it was an agreement to do illegal acts. This argument is, in my judgment, ill-founded since the true view appears to me to be, as I have already said, that the agreement was void *ab initio*.

The question remains, however, whether the facts that the parties thought that there was a valid agreement and that the services rendered and accepted were performed under a supposed agreement precludes a claim upon a *quantum meruit*. Mr. Croom-Johnson argued that this question must be answered in the affirmative, and he relied upon a passage in the judgment of a divisional court in *Re Allison, Johnson & Foster, Ltd.* (1). In that case a Mr. Birkenshaw had been appointed liquidator by a resolution of the company consequential upon a resolution for voluntary winding up. He acted as liquidator for some six months at the expiration of which an order was made by FARWELL, J., declaring that the proceedings at which the winding up resolution and the resolution appointing Mr. Birkenshaw liquidator were passed were invalid *ab initio*. The company was subsequently put into compulsory liquidation and Mr. Birkenshaw claimed in respect of work done by him in his assumed capacity as liquidator. This claim necessarily failed, but he also claimed on a *quantum meruit*. As I read the judgment, the court treated the claim as being divisible into three possible heads, namely (i) a claim in respect of work connected with the liquidation of the company, which it was assumed was validly proceeding, (ii) a claim in respect of work beneficial to the company for business purposes unconnected with the supposed liquidation, (iii) a claim in respect of work utilised by the liquidator appointed in the compulsory winding up with knowledge of the facts; this claim would include matters falling under head (i). The court held that Mr. Birkenshaw would be entitled to claim upon a *quantum meruit* under heads (ii) and (iii). The passage relied upon by Mr. Croom-Johnson appears to me to refer only to head (i). It is as follows (p. 330) :

There can be no implied contract for payment arising out of acceptance of the work done where the work was done upon an express request which turns out to be no request at all, but which down to the time when the whole of the work had been done was supposed by both parties to be valid and operative.

This passage must, in my judgment, be read in relation to the subject matter with which it is dealing, namely, work done under a supposedly valid winding up resolution. I do not see how any request could in any

circumstances be implied when the whole assumption upon which the work was done, and the only assumption upon which it would have been of any use to the company, namely, that a valid liquidation was in progress, turned out to be ill-founded. I doubt myself whether the passage relied on means more than this. If, however, it does involve the proposition mentioned by GREER, L.J., in the judgment just delivered, I agree with the criticism of it there made. I agree also with the observations of GREER, L.J., on this part of the case, and do not desire to add anything thereto.

With regard to the period before the date of the supposed contract, services rendered down to Dec. 31, 1930, are covered by the payment of £948 6s. 9d. mentioned in clause 1 of the agreement. This sum was paid and accepted by the plaintiff and, as I understand it, Mr. Pritt does not make any further claim in respect of this period even if the agreement is void. With regard to the period from Jan. 1, 1931, to the date of the agreement (namely, Apr. 14, 1931) the work done could not upon any view be said to have been done upon the assumption that the agreement was a valid one.

I agree with the order proposed by GREER, L.J.

GREER, L.J. : TALBOT, J., has read these judgments and concurs in them and does not desire to add anything to them.

Appeal allowed.

Solicitors : *Kenneth Brown, Baker, Baker* (for the appellant) ; *Ward, Bowie & Co.* (for the respondents).

[*Reported by W. K. SCRIVENER, ESQ., Barrister-at-Law.*]

LINDSEY COUNTY COUNCIL v. MARSHALL.

[HOUSE OF LORDS (Viscount Hailsham, L.C., Viscount Sankey, Lord Russell of Killowen, Lord Macmillan and Lord Wright, M.R.),
Feb. 20, June 11, 12, 15, July 14, 1936.]

Medicine—Maternity home provided and controlled by county council—Incoming patient not warned of infection—Recent case of puerperal fever—Disease contracted by patient—County council's liability for negligence of professional staff.

The appellants admitted the respondent as a patient to their maternity home at Cleethorpes for the purpose of her confinement, without informing her that there had been a recent case of puerperal fever in the home. While in the home the respondent contracted puerperal fever and was for some time seriously ill. In an action by the respondent to recover damages from the appellants for injury caused by the negligence of their professional staff :—

HELD : the appellants or their staff knew or ought to have known that in admitting the respondent to the home they were exposing her to the danger of infection, and the appellants were consequently negligent in not duly warning her of the existence of that risk.

Per LORD WRIGHT, M.R. : To apply *Hillyer's* case (2) to facts like these would involve a great extension of the rule which the Court of Appeal there laid down, and indeed would contravene the limitations which KENNEDY, L.J., placed upon it.

[EDITORIAL NOTE.] The effect of this decision of the House of Lords is to leave untouched the line of cases of which the leading case is *Hillyer v. St. Bartholomew's Hospital (Governors)* (2). The principle laid down in those cases is that a hospital authority is not liable for the negligence or lack of due care or skill of its doctors or nurses in the medical treatment or nursing of a patient, when the hospital authority has shown due care in the selection of competent doctors or nurses. In such cases the doctor or nurse, it would appear, when acting in a professional capacity is not the agent of the hospital authority. In the present case the complaint was not in respect of medical treatment or nursing, but in respect of the failure to warn the appellant or her private medical adviser of a risk of infection which she ran on admission to the nursing home, a risk of which the medical officers of the nursing home should have been aware. The medical officers were thus acting as the agents of the hospital authority which in accordance with general principles of the law of agency was liable for their acts.

AS TO LIABILITY OF HOSPITAL AUTHORITIES, see HALSBURY, 1st Edn., Vol. 20, Medicine, p. 334, para. 818; and FOR CASES see DIGEST, Vol 34, pp. 550, Nos. 86, 87.]

Cases referred to :

- (1) *Powell v. Streatham Manor Nursing Home*, [1935] A.C. 243; Digest Supp.
- (2) *Hillyer v. St. Bartholomew's Hospital (Governors)*, [1909] 2 K.B. 820; 34 Digest 550, 87.
- (3) *Evans v. Liverpool Corpn.*, [1906] 1 K.B. 160; 34 Digest 550, 86.
- (4) *Hall v. Lees*, [1904] 2 K. B. 602; 34 Digest 26, 51.

APPEAL from an order of the Court of Appeal (GREER and ROCHE, L.J.J., MAUGHAM, L.J., dissenting) affirming the judgment given in favour of the respondent for £750 damages on the trial of the action before LAWRENCE, J., and a special jury at Lincoln.

The facts and the arguments are fully set out in the judgments.

Edward W. Cave, K.C., and *Walker Carter* for the appellants.

T. Norman Winning and *Geoffrey Smallwood* for the respondent.

VISCOUNT HAILSHAM, L.C. : My Lords, this is an appeal from an order of the Court of Appeal affirming the judgment of LAWRENCE, J., in favour of the respondent for £750 damages pursuant to the verdict of a jury in her favour. The appellants own and control a maternity home known as the Cleethorpes Maternity Home, which is carried on by them under statutory powers. Cleethorpes Maternity Home is a comparatively small three-storey building containing in all 16 beds for patients. Some of the beds are in single rooms and are known as "private wards," and for these a charge is made of four guineas a week. The remaining beds are in public wards, and the charge for admission to these is two guineas

a week. The patients in the home are attended by their own doctors ; the appellants provide a nursing staff, three of whom are certified midwives. The appellants administer the home through their maternity and child welfare committee, which consists partly of members of the appellant council and partly of co-opted members. That committee has a sub-committee which meets at Cleethorpes every two months for the management of the home. The committee are advised in the management of the home by a Dr. Campbell, who is county medical officer of health, and a Dr. Stott, who is an assistant medical officer of health for the county and the medical superintendent of the home. Both these doctors described their duties as purely administrative, by which I understand them to mean that they performed no clinical duties and took no part in the treatment of any of the patients.

In the month of Jan., 1933, the respondent interviewed the matron at the home with a view to admission for confinement in the following July. She explained that the date at which she expected to be confined was about July 4, and she arranged with the matron that she should have a private ward at a cost of four guineas a week and that she should be attended by her own doctor. On June 30, 1933, a Mrs. Franklin was admitted to the home. On July, 4 Mrs. Franklin developed a high temperature and her doctor diagnosed her as suffering from appendicitis and she was removed by ambulance to Grimsby General Hospital. On her removal the ward in which she had been lying and the nurses who had been in contact with her were disinfected in accordance with the ordinary routine when a temperature case arises. On arrival at the hospital it was ascertained that Mrs. Franklin was in fact suffering from acute puerperal fever. Puerperal fever is a very dangerous and highly infectious disease. On July 5, the authorities at the home were informed by Grimsby General Hospital of their diagnosis and thereupon a further disinfection took place. Normally, the proper course to adopt on the appearance of a case of puerperal fever is for swabs to be taken of the throats of all persons who have been in contact with the patient in order that it may be ascertained by bacteriological examination whether any such person is a carrier. In Mrs. Franklin's case no swabs were taken as it was thought that the disinfection on July 4 would have rendered that precaution useless for the purpose of ascertaining whether a carrier was present. On July 9, a Mrs. Fleming was admitted to the home ; she developed a temperature of 100·6 on the following day after her confinement and a similar temperature again on July 11. Her case therefore became notifiable as a case of puerperal pyrexia, and in fact it was subsequently ascertained that there were present in her case the germs which cause puerperal sepsis. On the evening of July 12, the plaintiff was very near her confinement, and accordingly her husband communicated by telephone with the home and was instructed to bring

his wife. On their arrival late that night they were informed that there was no private ward available and that she would have to go into one of the other wards. After some hesitation they decided that the plaintiff should go into an ordinary ward on the understanding that she would be removed to a private ward as soon as possible. No information was given to the plaintiff or her husband or her doctor at any time before her admission about the case of Mrs. Franklin or of Mrs. Fleming, and nothing was said to any of them to indicate that there had been any recent case of infection at the home. On July 13, the plaintiff's child was born; on July 16, four other patients in the home developed puerperal fever; on July 17, the plaintiff herself developed the fever. She was ultimately removed to an infirmary and suffered a very severe attack of the disease. On July 17, Dr. Campbell and Dr. Stott decided to close the home against any further admissions.

The case was heard before LAWRENCE, J., and a special jury at Lincoln Assizes in June, 1934. A series of questions were left to the jury, which with their answers are as follows:—

(i) Was the contract to supply a private room subject to there being one available?—No.

(ii) Was the contract to supply such a private room on July 4 or when she presented herself?—When she presented herself.

(iii) Was it varied by the plaintiff agreeing to enter public ward?—No.

(iv) Was it a breach of duty not to refuse admission to the home to new patients from July 5 onwards?—Yes.

(v) Was there any breach of duty in the administration of the home from July 4 to 20?—Yes.

In what respects?—Swabs should have been taken from the whole of the staff immediately on the report of Mrs. Franklin's case.

(vi) Was it a breach of duty not to inform the plaintiff or her husband or her medical adviser of Mrs. Franklin's case?—Yes.

(vii) Did plaintiff's illness flow from the breach of duty specified: (a) in question

(iv)?—Yes. (b) in question (v)?—Yes. (c) in question (vi)?—Yes.

(viii) Damages.—£750.

On these findings judgment was entered for the respondent for £750 with the costs of the action. The appellants appealed to the Court of Appeal. In that court it was unanimously held that there was no evidence to support the answers of the jury to the first three questions. MAUGHAM, L.J., further held that there was no evidence to justify the answers to the remaining questions; the other two members of the court held that the answer to the fifth question afforded no cause of action because the responsibility was shown to lie with Dr. Stott and not with the defendants, but they held that there was evidence to justify the answers to the sixth and seventh questions and that these answers justified the judgment in favour of the plaintiff. It is not very clear what view the majority of the Court of Appeal formed about the answer

to the fourth question. GREER, L.J., with whose judgment ROCHE, L.J., agreed, expressed the opinion that the decision as to the closing of the home rested with Dr. Campbell and Dr. Stott, and that in taking their decision they were not acting as servants of the defendants, but at the conclusion of his judgment GREER, L.J., said that there was evidence on which the jury could find that the matron was negligent in admitting the plaintiff to the home when she knew, or ought to have known, that there was danger to the plaintiff if so admitted. At the hearing at your Lordships' bar, counsel for the respondent did not challenge the decision of the Court of Appeal upon the answers to the questions as to contract, and the result of the appeal, therefore, must depend upon the question whether there was evidence to justify the findings of the jury with regard to the latter questions. I think these answers must be read together, and that it is a reasonable interpretation of those answers that the jury must have considered that it was unsafe to receive new patients into the home after it had been ascertained that Mrs. Franklin was suffering from puerperal fever, without ascertaining whether or not there was a carrier in the staff by taking swabs from all the nurses who had been in contact with Mrs. Franklin; and that if new patients were admitted before that fact was ascertained their doctors should have been informed of the facts, in order that they might decide whether or not their patients should be allowed to enter the home and what precautions against infection should be taken if they were admitted. The questions for your Lordships to consider are (i) whether there was evidence to justify these findings of fact, and (ii) if there was such evidence, whether those facts constitute an actionable wrong by the appellants as against the respondent. It was not disputed that if those questions were answered in favour of the respondent, the damages as found by the jury were occasioned by the breach of duty. Medical evidence was called on both sides at the trial. I propose only to remind your Lordships of such evidence as bears directly on the question of the taking of swabs.

The plaintiff's own doctor, Dr. Thompson, said that after a case of puerperal fever the first step was to swab all throats and that the matron and staff should not be allowed to attend other patients until it had been ascertained that the swabs gave a negative result. Dr. Stott said that he would find out by swabs taken from the nurses' throats whether there was a carrier there, that there was always the possibility of a carrier, and that for that reason swabs ought to be taken. Dr. Alison an eminent gynaecologist, who was called for the appellants, said that swabs should be taken from the noses and throats of all contacts, including nurses and friends, and sent for bacteriological examination, and all contacts up to 48 hours after the woman's child was born. In view of that evidence, it seems to me that the jury were amply justified in thinking

that without taking swabs there was a grave risk that a carrier might be present, and that until that risk had been eliminated it was a dangerous thing to admit a new patient to the home. Counsel for the appellants explained that the reason why swabs were not taken was that when Mrs. Franklin was removed from the home on July 4, the nurses were disinfected in the ordinary routine, and that when it was ascertained on July 5 that the case was one of puerperal fever, the disinfection on the previous day rendered the taking of swabs impossible. The jury might well have reached the conclusion that, while those circumstances explained the reason why swabs were not taken, they afforded no justification for admitting new patients until it had been ascertained whether there was a carrier in the home. They may well have thought that if the appellants chose to admit new patients into the home, without having been able to ascertain whether a carrier was present, they ought at least to have warned those patients, or their medical advisers, of the facts so that they might decide for themselves whether they would face the risk and, if so, of the precautions they would take to avoid the risk. Dr. Thompson, for example, was emphatic in his view that, had he known the facts, even if his patient had been admitted into the home, he would have insisted that no one who had been in contact with Mrs. Franklin should be allowed to take any part in her nursing. I am therefore clearly of opinion that there was ample evidence to support the conclusions of fact and that the first question must be answered in favour of the respondent. But it was contended on behalf of the appellants that even if there was negligence in continuing to admit new patients, and in not informing them of the facts, the responsibility rested upon Dr. Campbell and Dr. Stott and the defendants were not liable in law. I am unable to accept that view of the law. The appellants were carrying on a maternity home, and they were inviting prospective mothers to make use of the home for the purpose of their confinement. In those circumstances they owed a duty to those whom they invited into the premises to make those premises reasonably safe, or if there was any hidden danger of which they or their agents were or ought to have been aware, to give the persons so invited due warning of its existence. The appellants are, of course, a corporation and they can only act by agents. They appointed as their agents to manage this home the sub-committee of the maternity and child welfare committee, and that committee in turn looked to Dr. Campbell and Dr. Stott to advise them upon medical questions. But the duty is laid by law upon the appellants and they were responsible in law for the mistakes of their agents. I can see no difference in principle between the employment of a doctor to advise on medical questions and the employment of any other skilled person to advise upon other questions. In my judgment, the jury were amply warranted in finding that the home was dangerous, for the reasons

which I have indicated, and that the plaintiff should have been warned of the danger, and it is no excuse in law for the appellants to say that they were misled by the mistakes of the agents whom they employed.

Reliance was placed by the appellants upon a series of cases in English and Scottish courts, in which it has been decided that where a public authority carries on a hospital that authority is not responsible to patients for mistakes in medical treatment or in nursing, provided that they have taken reasonable care to appoint competent doctors and nurses. The respondent challenged the correctness of these cases, and referred your Lordships to the recent case of *Powell v. Streatham Manor Nursing Home* (1), to show that your Lordships' House gave judgment against the proprietor of a nursing home where the nurses employed by him had been guilty of negligence. It is true that the correctness of the earlier decisions is still open to review in your Lordships' House. But that review should only take place in a case in which the point is directly raised; the question as to the correctness and as to the limits of the doctrine is obviously one of great importance, both to those who are charged with the responsibility of carrying on hospitals and nursing homes, and to the public who make use of such hospitals and homes. In my judgment, those questions are not raised by the facts in this case and nothing that I have said must be taken as throwing any doubt upon the correctness of those decisions. The principle upon which those cases were determined is well stated in *Hillyer v. St. Bartholomew's Hospital (Governors)* (2), in the judgment of KENNEDY, L.J., at pp. 828 and 829. KENNEDY, L.J., expresses the opinion that the legal duty which the hospital authority undertakes towards a patient, to whom it gives the privilege of skilled surgical, medical and nursing aid within its walls, is an inference of law from the facts, and he holds that the responsibility of the hospital authorities is limited to undertaking that the patient shall be treated only by experts, whether surgeons, physicians or nurses, of whose professional competence the governors have taken reasonable care to assure themselves, and further that those experts shall have at their disposal for the care and treatment of the patient fit and proper apparatus and appliances. It is obvious that, if that is the correct view of the relationship between the hospital authorities and their patients, there is no breach by the authorities of such duty by reason of the fact that a competent doctor or nurse is guilty of negligence or lack of due care or skill in their treatment of a patient. My Lords, it seems to me that this principle can have no application to the facts of this case. The appellants were not providing any medical attendance for the respondent and there is no complaint that the nurses were guilty of any lack of skill or care in attending her. The complaint is that the appellants invited the respondent to a home, which they ought to have known was in a dangerous condition, and that

they did not inform her of the facts which constituted the danger. In my judgment, there is nothing in the principle of the cases on which reliance is placed to absolve the appellants from their responsibility for that breach of duty. The reason why the hospital authorities were held not liable in *Hillyer's* case (2) is because the doctors and nurses were held not to be acting as their agents or servants in the giving of medical treatment. There is no trace of any authority in those cases or elsewhere for the view that where a corporation acts by an agent, its liability for the mistakes of that agent is any less where the agent is a medical man than where the agent belongs to any other profession or calling. It follows that in my judgment the appeal fails and should be dismissed with costs, and I move your Lordships accordingly.

VISCOUNT SANKEY : My Lords, this is an appeal by leave of the Court of Appeal from an order of His Majesty's Court of Appeal (England) dated Feb. 8, 1935, ordering the verdict given and judgment directed to be entered for the plaintiff on the trial of the action before LAWRENCE, J., to be affirmed.

The judgment of the Court of Appeal was a majority one, GREER and ROCHE, L.JJ., being for affirming the judgment and MAUGHAM, L.J., for entering judgment for the defendants.

The action was one for damages alleged to have been sustained by the plaintiff by reason of her contracting puerperal fever whilst in a maternity home at Cleethorpes belonging to the defendant county council. It was admitted on behalf of the defendants that the plaintiff contracted puerperal fever while she was in the home.

About Jan., 1933, the plaintiff called at the nursing home, saw the matron, and told her that her doctor had recommended her to go to the home to be delivered of her baby, which she expected on July 4, that she wanted a private ward, and that her own doctor would attend her. It is unnecessary to state in great detail the other facts of the case, but I take such as are necessary for my opinion from the judgment of MAUGHAM, L.J. They are as follows :

On July 12, at 11.30 p.m., the plaintiff's husband rang up to say that she was expecting a proximate delivery. Someone on the telephone told them to come along, and she arrived with her husband shortly before midnight on that day. She was delivered on the following day, and a few days later she was found to have contracted puerperal fever, and thereby suffered substantial damage. Now, a Mrs. Franklin had been a patient at the home. She was admitted on June 30, and delivered on July 1. On the morning of July 4, she had a temperature of 100.4 deg., and suffered from pain. This was a case of puerperal pyrexia, which might be due to many causes, puerperal fever being one of them. She was being attended by her own doctor, Dr. Deighton. He diagnosed

the case as one of appendicitis. In the evening the fever rose to 105 deg. and Dr. Deighton, after attending the case with his partner, who agreed with his diagnosis, had the patient removed to the Grimsby and District Hospital. This was duly reported to Dr. Stott and the disinfection precautions of fumigation and spraying, usual in every case of puerperal pyrexia, were taken on that day. On the patient reaching the hospital the case was diagnosed by Dr. Chapman as one of puerperal fever. On July 5 that opinion was reported to the matron of the home and by her to Dr. Stott and by him in turn to Dr. Campbell. Dr. Stott called himself at the home and gave detailed instructions on July 5 as to what was to be done as regards disinfecting the wards, the clothes, and so forth. The whole staff had already had disinfectant baths and were gargling their throats with disinfectant. Nurse Siddle, who had delivered Mrs. Franklin, was put off her duty for 48 hours and came back on July 8. It is important to observe that Dr. Stott was quite satisfied with the precautions taken, and directed special precautions to be taken as regards the Gray Ward, where Mrs. Franklin had been while she had a temperature, and it was kept closed till July 11. He never suggested closing the home to further patients and has given evidence that he thought such a course, as also the giving of a warning to anyone, was quite unnecessary.

On July 12 another patient, Mrs. Fleming, who had been admitted on July 9 and delivered shortly afterwards, had a temperature which was diagnosed by her doctor, a Dr. Montgomery, as due to erosion of the cervix. The case was reported to Dr. Stott and the usual disinfectant precautions were taken as in every case of temperature over 100.4 deg., whatever its cause. The illness of Mrs. Fleming was never diagnosed at the time as a case of puerperal fever, and the fever was a not unusual symptom, and Dr. Stott saw nothing alarming about it. It is, however, possible that it was a case of mild puerperal fever.

On the evening of July 12, at about 11.30 p.m., the plaintiff's husband rang up the home and said she was coming in at once and she and her husband arrived at the home a little before midnight. She said that she was expecting a private ward, but she was told there was not a private room available, and after some conversation she agreed to share a room with other patients and was put in ward 7 (the separation ward) with Mrs. Fussey and Mrs. Ladlow, who had both arrived on that day. The home was then full. The plaintiff was expecting immediate confinement and was taken to the labour room, the name given to the surgical room where all confinements take place, but was brought back when it became apparent that the birth was not quite imminent. Her doctor was Dr. Williamson, but he was not available, and his *locum tenens*, Dr. Thompson, delivered her on the night of July 13, the matron and another nurse (Holmes) being present. After confinement she was

removed to the Grant Ward, where Mrs. Fussey and Mrs. Ladlow were by that time. By that time and on July 15 everything was normal in the home. Mrs. Towle and Mrs. Cudmore, who had been in the ward with Mrs. Franklin, had developed no symptoms of fever or illness. The matron, Dr. Stott and Dr. Campbell did not think that any risk of infection from Mrs. Franklin was left after the various measures of disinfection. That unfortunate lady, however, died on July 13, in Grimsby Hospital; the jury was plainly taking the view that she died of puerperal fever and there was ample evidence to justify that view. On the morning of July 16, Mrs. Fussey and Mrs. Ladlow developed temperatures and in the afternoon Mrs. Johnson and Mrs. Hardy also did so. Mrs. Fussey and Mrs. Ladlow were taken out of the Grant Ward, leaving the plaintiff alone there. It was a Sunday. The matron first spoke to Dr. Montgomery, who was visiting a private patient. She then telephoned to Dr. Stott, who was out, and then to Colonel Stephen, a consulting obstetrician appointed by the defendants. He came and recommended that the four ladies mentioned should be taken by ambulance to the Scarthoe Road Infirmary. On July 17 the plaintiff had a temperature of 102.4 deg. Her own doctor, Dr. Brown, a partner of Dr. Williamson, came in and gave instructions as to her treatment. Dr. Stott and Dr. Campbell both came on the morning of July 17, and it was decided to close the home to fresh patients for the time, for the events of July 16 had showed that they had to deal with an outbreak of puerperal fever. The plaintiff had contracted the disease and was removed on the 20th. It may be added that between the time Mrs. Franklin was delivered and the plaintiff was delivered there were 17 women delivered at the home. Of these women five, including Mrs. Franklin, had puerperal fever, and Mrs. Fleming may possibly have had it. Two died, Mrs. Franklin and Mrs. Fussey (and her baby). Ten were free from any illness.

These being the facts, the trial judge left a number of questions to the jury. Question (iv): Was it a breach of duty not to refuse admission to the home of new patients from July 5 onwards? The jury answered "Yes."

(v) Was there any breach of duty in the administration of the home from July 4 to 20? If so, in what respect? Answer: "Yes. Swabs should have been taken from the staff immediately after the report of Mrs. Franklin's case."

(vi) Was it a breach of duty not to inform the plaintiff or her husband or her medical adviser of Mrs. Franklin's case? Answer: "Yes."

(vii) Did the plaintiff's illness flow from a breach of duty under questions (iv), (v) or (vi)? Answer: "Yes."

(viii) Damages. Answer: "£750."

Now, the Court of Appeal were unanimous in thinking that there was

no evidence upon which the jury could answer questions (iv) and (v) in the affirmative, GREER, L.J., stating, before dealing with the last two questions: "I think I ought to deal with the learned judge's decision that the defendants were responsible for any negligence which might be established on the part of Dr. Stott." The learned Lord Justice then discussed the case of *Evans v. Liverpool Corpn.* (3), and said that in his judgment the decision of WALTON, J., in that case applied to the present case. He added that the decision of WALTON, J., was approved in the Court of Appeal in *Hillyer v. St. Bartholomew's Hospital* (2). We had the advantage of having these cases cited to us, together with the case of *Hall v. Lees* (4).

The learned counsel for the appellants in my view correctly summed up the law as laid down in those cases in the following way: "In the case of a nursing home conducted by local authorities, the local authority is not responsible for negligence of doctors, matron or nurses while acting in the exercise of their professional functions and knowledge." He added that each of the matters found against the defendants in the present case were matters involving exercise of professional knowledge or skill, and that even if it can be said it was an act resulting from the exercise of purely administrative duty, there was no evidence upon which the jury could find a breach of duty or negligence.

Speaking for myself, throughout the case I have felt considerable embarrassment flowing from the fact that the Court of Appeal found that there was no evidence to support the verdict of the jury under question (iv), but there was evidence on which they could come to the conclusion they did in answer to question (vi). But as the learned counsel for the respondents told us that he did not rely upon the answer to question (iv), it is unnecessary to pursue that matter further. The appeal in your Lordships' House must, therefore, depend upon the position caused by the evidence and the answer to question (vi). In these circumstances it is not necessary for me to go at length into the decisions to which I have already referred. I should like, however, to point out that great care must be taken in considering those decisions and bearing in mind the consequences which flow from a breach of contract and the consequences which flow from a tort. In some cases it may make no difference whether the action is laid in contract or tort, as in the familiar one of a passenger travelling by a train and being injured by the negligence of the railway company, he can rely on the contract to carry safely or upon the tort caused by the negligence of the railway company in not carrying him safely.

In *Hall v. Lees* (4), I doubt whether any general principle was involved. The question really turned upon the documents—what was the contract? Was it a contract to nurse or a contract to provide competent nurses? *Evans v. Liverpool Corpn.* (3) was approved and followed.

Hillyer v. St. Bartholomew's (2) may be said to establish the doctrine that a defendant is not liable for the negligence of a doctor while acting in the exercise of his professional functions and knowledge. Indeed, FARWELL, L.J., puts it rhetorically as an example, that when once the doors of the operating theatre are closed upon them for an operation the doctors and nurses present in the operating theatre are no longer the servants of the authority. I am far from saying that this is not the proper legal result, but I should add that it may be necessary to delimit the frontiers of liability. There may be some cases where a doctor, a matron, or a nurse is clearly doing an act in his or her professional capacity: there may be other cases where a matron or nurse, and as I think even a doctor, may be doing an act not in his or her professional capacity. It may be that on one side of the line you may have acts which are clearly professional for which a local authority would not be liable. On the other side, acts which are clearly administrative or of some other character than professional which might make the authority liable: and there may be difficult cases on the border line. But it is not necessary to discuss or lay down the law on these subjects, having regard to the answer of the jury to question (vi).

The jury have found that it was a breach of duty not to inform the plaintiff, or her husband, or her medical adviser of Mrs. Franklin's case. Can that be supported either in law or fact?

In cases of this character, so far as they are based on negligence, the plaintiff has to show that she contracted the disease by reason of negligence of persons for whose acts the defendants were responsible, and this requires proof that the plaintiff has suffered injury by reason of a breach of duty amounting to negligence on the part of some person or persons employed at the home, and consequently that the acts amounting to breach of duty were acts done as the servant to or agent of the defendants.

What, then, is the duty cast upon a local authority in a case like the present? In my view it is their duty to provide a home reasonably fit and to provide proper accommodation in it, and if there have been circumstances known to them which might render the home not so fit, it is their duty to warn a person proposing to enter the home, of such circumstances. There is no absolute warranty that the home shall be fit. The question whether there has been negligence or breach of that duty is one for the jury on proper evidence. Was there in this case evidence upon which the jury could find as they did? I think there was. First it is suggested that it was quite impossible to give the lady any warning when she arrived at midnight on July 12. If the only fact had been that she arrived as an emergency case, without any previous notice, different considerations might arise, but those are not the facts in the present case. The plaintiff had given notice that she was coming in

months before, and that she was coming in early in July, and upon July 5 the matron knew that Mrs. Franklin was suffering from puerperal fever, and there was no reason why notice should not have been sent then.

It may then be asked to whom ought they to have sent notice? To have sent notice to a woman herself in such circumstances might have made her unduly nervous, but it was open to the jury to find, as I think they must have found, that notice ought to have been sent to her husband or to her medical adviser, and they probably did come to the conclusion, from the evidence of her doctor, that if such notice had been given she would never have come to the home at all.

As ROCHE, L.J., put it in his judgment :

I confess, however, that when I consider what in comparable circumstances would be expected, and would I think generally be done by private hosts and by those responsible for private nursing homes, and even by agisters and livery-stable keepers in the case of infectious animal disorders, I cannot regard the difficulties [i.e., the difficulties of giving notice] as serious, still less as insuperable. Speaking for myself, I should think that communication to the doctor or husband, or both, was the proper course, and that any time would do—the earlier the better—before admission. With regard to the difficulty the plaintiff would have been in, this, I should imagine, could have been overcome by the adoption of the method employed by countless women in all circumstances of life—namely confinement in her own home and attendance by a doctor and a private or district nurse, or in an extreme emergency by an experienced friend or neighbour.

Again, it might be asked : “ Would a local authority always have to give notice of a case of puerperal fever having occurred in their home ? ” That again is a question of fact for the jury. There may be cases where it was said that there was no evidence upon which the jury could come to the conclusion that there had been circumstances which made the home not reasonably fit. For example, supposing 20 years before the patient arrived there had been a case of puerperal fever, but that there had never been another case since. Or, again, supposing there had been a case of puerperal fever, say, two or three months before the plaintiff came in, and supposing that the local authority had then shut up the house for some weeks and had it fumigated, it might well be that there was no evidence upon which a jury could find that there were circumstances which rendered the home not reasonably fit for its purpose, or that the failure to warn a person who proposed to enter the home was negligence or a breach of duty. But everything depends upon the facts of the case, and I cannot help thinking that, having regard to the incident of Mrs. Franklin, and all the surrounding circumstances connected with it, it was a case where the jury could rightly and properly find that it was a breach of duty and neglect on behalf of the defendants not to give the plaintiff notice of Mrs. Franklin’s case. It seems to me

they took the risk of things being all right, and they were not entitled to take that risk.

Then it was said that they are covered by the professional advice of the doctors that fumigation had been properly resorted to. In my view that does not affect the liability under this head. I agree with the majority of the Court of Appeal in thinking the matron ought to have given warning, and I further think that the doctors ought not necessarily to have given notice themselves to incoming patients, but to have caused notice to be given.

For these reasons I think the appeal should be dismissed. I need not refer to the application for a new trial. It was not seriously pressed, nor should it succeed.

LORD RUSSELL OF KILLOWEN : My Lords, as this case was presented in the courts below, I would have said that not one of the findings of the jury in answer to questions (iv), (v) and (vi) was supported by any evidence : and I would have agreed with the judgment of MAUGHAM, L.J. Your Lordships, however, think that the findings of the jury read together may be interpreted as meaning that there was negligence on the part of those who represented the defendants at the home, in admitting the plaintiff without first informing her doctor that in fact no swabs had been taken from the staff. If the answers can be so interpreted and there was any evidence upon which the jury could come to that conclusion, this appeal must fail. For myself I feel grave doubts whether this is the true interpretation of the jury's answers, but I am not prepared to say that it is not a possible interpretation. I feel the same doubts as to the existence of any evidence to support such a finding. The majority of your Lordships, however, have been able to detect some such evidence in the shorthand notes ; and in view of this fact I find it difficult, if not impossible, to say that the jury were entirely without materials upon which to base their finding. In the result I am prepared to concur, but without enthusiasm, in the motion proposed.

LORD MACMILLAN : My Lords, the appellants are responsible in law for the due administration of the institutions which they carry on in the performance of their statutory duties or in the exercise of their statutory powers. This responsibility extends to the actings of those through whose agency they perform their duties or exercise their powers. Consequently if the respondent's unfortunate experiences in the Cleethorpes Maternity Home were due to the negligence of the appellants' agents or servants in the conduct of the home the appellants are answerable, It must be shown that the appellants owed a duty to the respondent, that the agents whom the appellants employed to perform that duty on their behalf were negligent in the discharge of it and that the injury

suffered by the respondent was directly attributable to such negligence. The respondent was received into the appellants' maternity home when, as the event proved, it was not safe owing to the existence of infection. It was undoubtedly owing to the presence of that infection that the respondent contracted puerperal fever in the home. These facts by themselves are not sufficient to impose liability on the appellants to compensate the respondent. The appellants do not warrant that their maternity home is safe. It must further be shown that the appellants through their agents or servants acted negligently in the matter of the admission of the respondent to the home while it was in an infected condition. If the appellants' medical officers or matron thought that there was any risk of infection in the premises—and I include, of course, any risk of infection from the nurses and attendants in the premises—I think it was plainly their duty to warn the respondent or her husband or her doctor of the possible danger. They had taken what they conceived to be adequate precautions to ensure disinfection, and no doubt honestly believed that there was no danger in admitting the respondent and consequently no necessity to give any warning. There was, however, evidence to the effect that the precautions taken were not adequate and that the medical officers and matron ought to have known of the element of danger present, and ought to have given warning of it. If the jury believed this evidence, as they appear to have, they were entitled to find that there had been negligence on the part of the appellants' representatives in admitting the respondent to the home without any warning. There was also evidence that if such warning had been duly given the respondent would not have sought admission to the home.

The appellants' main defence was that the question whether the home was or was not free from infection was a medical question upon which they were not competent to pronounce and upon which they had necessarily to rely on their professional advisers. If the latter advised wrongly, the appellants claimed that they were under no liability for the consequences of such wrong advice. Now, I do not doubt that in matters relating to the medical or surgical treatment of patients in a home or hospital the lay administrators of the institution cannot be held liable for the mistakes or negligence of the physicians or surgeons whom they employ, provided that they have been selected with due care. There are authoritative decisions to that effect. But the present case does not relate to a matter of professional treatment. The question was one of the safety of the premises for the admission of the public, and while the appellants may well say that they could not themselves as laymen know whether there was any danger of which intending inmates should be warned, nevertheless I do not think that they can escape responsibility for the negligently mistaken view of their medical officers and matron on this point, any more than they could escape responsibility

for a dangerous state of the drains in the home merely because their sanitary inspector had reported them to be in order. The appellants have a duty to take by themselves or their officers all proper steps to keep the premises safe for the admission of the public, or if they have not done so either to exclude the public altogether or at least to warn them of the danger.

There being evidence on which the jury could find that there was negligence on the part of those for whom the appellants are responsible in not knowing, as they ought to have known, that in admitting the respondent to the home they were exposing her to the risk of infection and consequently that there was negligence in not giving warning of that risk, I am of opinion that the verdict of the jury, so far as upheld by the Court of Appeal, must stand.

LORD WRIGHT, M.R.: My Lords, I agree with the opinion of VISCOUNT HAILSHAM, L.C. I shall merely add a few observations out of respect to those who have taken a different view.

The case on behalf of the appellants is that in the matters in question the appellants owed no duty to the respondent, and that accordingly the findings of the jury must be set aside. I disregard the further contention that in any case the findings were without any evidence or any evidence on which a reasonable jury could find as they did. No doubt the evidence was conflicting and no doubt the jury might have come to a different conclusion on the evidence. But in my opinion there was reasonable evidence on which they could find as they did. I am here only dealing with the answers to questions (iv) and (vi) and also to question (vii) which deals with damage.

Now, it is true that the answers (iv) and (vi) and each of them cannot stand if the duty which the answers presuppose did not exist between the appellants and the respondent. Whether the duty did or did not exist is a matter of law, which the court must decide on all the relevant facts.

Answer (iv) I understand to mean that according to the view of the jury the appellants by themselves or their agents knew or ought to have known that the home was not in a fit state to receive the respondent and involved a risk of infection because the premises or fittings or the staff or all of them had not been properly disinfected and hence she should not have been admitted.

Answer (vi) I understand to mean that in any case the appellants by their servants or agents knew or ought to have known of the risk of infection, and should have warned the respondent's doctor (and perhaps herself or her husband) of the risk, so that the doctor and the respondent could decide whether to take the risk. The jury obviously believed the evidence of the respondent, her husband and her doctor, that if warned

they would not have entered the appellants' home but would have sought accommodation elsewhere for the birth.

As to answer (iv), it might at first sight seem that on general principles there was a duty on those who operate a home such as that of the appellants for the reception of patients in order to be delivered, to exercise due care and skill by themselves and their servants to avoid receiving patients into their home so long as there was danger of which they knew or ought to have known of infection of puerperal fever, a serious disease which is extremely infectious and liable to be attended with grave and perhaps fatal consequences. I do not put the obligation as high as that of a warranty ; but the gravity of the risk must emphasise the gravity of the precautions proper to be taken to guard against it. The existence of the duty seems to follow from the general rules of the law of negligence. Now that the forms of action have been abolished and it is recognised that negligence is an independent tort, it is not necessary to consider if the duty is to be based on contract (there was a contract in this case between the appellants and the respondent) or whether it is based simply on the relationship between the parties, that is, on the respondent placing herself in the home and the appellants undertaking to receive her. I merely refer to this matter because of certain arguments addressed to your Lordships. I shall only add that though there was consideration in the facts of their case, the position would have been the same if the service had been voluntary. The duty arises from the fact that the respondent entrusted herself to the appellants' care and custody as regards hospital accommodation and nursing, which the appellants were holding themselves out as prepared to furnish ; similarly a surgeon who undertakes a gratuitous operation owes in performing the operation a duty of care and skill to the patient.

Answer (vi) deals with a duty which though analogous in principle is narrower in content. The appellants, who knew or ought to have known of the risk, should have given the respondent or her doctor the opportunity of deciding whether or not to run the risk. If they knowingly took the risk, they could not as against the appellants have complained of the consequences of their own act and volition. If the answer to question 6 is supported, it is enough by itself to justify the judgment for the respondent.

But on behalf of the appellants it has been contended they are free from all liability in the matter because the decision not to close the home or not to warn the patient before she is received, depended on questions of medical or hygienic skill and knowledge, in regard to which the appellants or their sub-committee were not competent to form an opinion, but were necessarily guided by their professional advisers, Dr. Campbell, the county medical officer of health, and Dr. Stott, the assistant county medical officer of health, who was medical superintendent

of the home, and the matron and nurses, about all of whom no reflection was made as to their competence.

In general, those who engage in an undertaking the actual conduct of which involves expert scientific or professional skill and knowledge which the principals do not possess, cannot escape liability to outsiders who are injured by the negligence of those who advise or act for the principals, on the ground that they, as principals, are laymen and must necessarily be guided by or act through experts. Most big concerns are managed by committees of business men who neither have nor profess expert knowledge : if this contention were to prevail in general, it would practically nullify liability of principals for their agents over a large area. But it is claimed that this is so in regard to hospitals and similar institutions. That immunity cannot be claimed by such institutions because of their character as such. I need only quote a short passage from the judgment of FARWELL, L.J., in *Hillyer v. St. Bartholomeu's Hospital Governors* (2), at p. 825 :

It is now settled that a public body is liable for the negligence of its servants in the same way as private individuals would be liable under similar circumstances, notwithstanding that it is acting in the performance of public duties, like a local board of health, or of eleemosynary and charitable functions, like a public hospital.

But the appellants rely on the statement of the duty of the hospital to the patient in the facts of that case as applying to the circumstances of the present case. It is important to observe exactly what that case decided. The plaintiff underwent an operation, a surgical examination under an anæsthetic, at the hospital ; there was evidence sufficient to be submitted to a jury if the defendants could in point of law properly be held responsible to the plaintiff for injury caused to him by negligence on the part of the surgeons and nurses engaged in the surgical examination to which the plaintiff submitted in the hospital of which the defendants are the governors. I quote from the language of KENNEDY, L.J., at p. 828. KENNEDY L.J., dealing there with a surgical operation, held that the defendants were not responsible for negligence of the experts, surgeons, physicians or nurses in the actual conduct of the operation, because in such matters they could not be deemed to be the servants or agents of the hospital authorities. But he went on to limit the immunity in this way, at p. 829 :

The governors of a public hospital, by their admission of the patient to enjoy in the hospital the gratuitous benefit of its care, do, I think, undertake that the patient whilst there shall be treated only by experts, whether surgeons, physicians or nurses, of whose professional competence the governors have taken reasonable care to assure themselves ; and, further, that those experts shall have at their disposal, for the care and treatment of the patient, fit and proper apparatus and appliances.

KENNEDY, L.J., later states, by way of distinction, his view :

that the hospital authority is legally responsible to the patients for the due performance of their servants within the hospital of their purely ministerial or administrative duties, such as, for example, attendances of nurses in the wards, the summoning of medical aid in cases of emergency, the supply of proper food, and the like.

LAWRENCE, J., in directing the jury in this case did, I think, correctly apply the principles laid down by KENNEDY, L.J. : he directed the jury :

that the administration of the home was done by the County Council through a sub-committee who employed Dr. Stott and Dr. Campbell and the matron and the nurses as their servants, and that they are responsible for the neglect and default of those persons in the carrying on of the home.

As I read the direction as a whole, I think that it amounts to a direction that the duty of seeing that the home was reasonably fit to receive the patient or in the alternative of warning the patient of the risk, was a matter of administration, for which the home was responsible ; it was not like the actual conduct of a surgical operation or the prescribing of medicines or medical treatment but was analogous to the provision of fit and proper apparatus and appliances or the supplying of proper food.

In my judgment the facts in this case are to be distinguished from those in *Hillyer's* case (2). It is not necessary to express here any opinion one way or the other about the correctness of that decision. That can be reserved until it comes, if it ever does, before this House : and the same may be said of *Evans v. Liverpool Corpn.* (3), which presents some differences from *Hillyer's* case (2). Nor is it necessary to consider what difficulties may arise in delimiting the respective frontiers of ministerial or administrative duties on the one hand and matters of professional care or skill on the other hand, if it ever becomes necessary to apply the distinction which KENNEDY, L.J., draws.

In the present case the duty of the appellants is in my opinion not different in principle from their duty if (for instance), there was good reason to suspect that the drains of the home were defective and involved a risk of causing typhoid to the patients. In that case the appellants would have to be guided by sanitary and hygienic experts and would be responsible for their negligence : similarly if a defective ceiling was negligently left unrepaired so that it collapsed and injured a patient in her bed. In these and many such cases the duty of the appellants is not different in essence from that of a householder who has to take care that persons invited into her house are not negligently exposed to danger, or at least are duly warned of the risk, as, for instance, if there has been scarlet fever in the house, so as to involve risk of infection. In the present case it was well known that puerperal fever was both infectious and dangerous. To apply *Hillyer's* case (2) to facts like these would involve a great extension of the rule which the Court of Appeal there

laid down and indeed would contravene the limitations which KENNEDY, L.J., placed upon it. Such a result would be very hard on the respondent : there would be no one whom she could sue for the damage she has suffered, whereas the plaintiff in *Hillyer's* case (2) could sue the surgeon for misfeasance.

It is not necessary to add that in all these matters not only the matron and nurses but the medical officers were in my opinion the servants of the appellants, as LAWRENCE, J., ruled. The fact that the appellants necessarily relied on their knowledge and judgments does not the less render them the appellants' agents to carry out the responsibility which rested on the appellants as operating the home.

Powell v. Streatham Manor Nursing Home (1) was referred to, but no question of law as to responsibility was raised in that case and it may for this purpose be disregarded.

I agree in the motion proposed.

Appeal dismissed with costs.

Solicitors : *Taylor, Jelf & Co.*, Agents for *Eric W. Scorer*, Lincoln (for the appellants) ; *Maude & Tunnickliffe*, Agents for *James Young*, Grimsby (for the respondent).

[Reported by MICHAEL MARCUS, Esq., Barrister-at-Law.]

Re FENWICK, FENWICK v. STEWART.

[CHANCERY DIVISION (Farwell, J.), June 16, 1936.]

*Estate and other Death Duties—Legacy duty—Incidence of duty—Settled legacy at discretion of trustees—Contingent legacy.**Executors and Administrators—Apportionment between capital or income—Power to trustees to determine in “cases of doubt.”*

A testator by his will gave to his trustees £20,000 free of duty upon trust during the life of his adopted daughter to use the whole or such part of the income thereof as they might think fit for the benefit of the adopted daughter and (within the limits permitted by law) to accumulate the remainder of such income and after the death of the adopted daughter to hold the capital and accumulations, if any, of such legacy upon the trusts therein declared, and it was provided that: “it shall be lawful for my trustees in their uncontrolled discretion (but during the lifetime of my wife only with her consent) to use the whole or any part of the capital or accumulations, if any, of the said legacy in any manner which they may think fit for the benefit of my said adopted daughter . . . or to make over the same to her absolutely.” The testator devised his residuary estate both real and personal to his wife for life with remainder to a nephew. By the will the trustees were given power, *inter alia*: “to determine in all cases of doubt whether any moneys coming into their hands are to be considered capital or income.” By a codicil the legacy of £20,000 was reduced to £15,000. The testator was survived by his wife and his adopted daughter. The trustees appropriated certain sums out of the capital of the estate to meet the settled legacy and paid to the adopted daughter the whole of the income from the investments representing such sums. On her marriage the trustees realised certain of these investments and settled them on her. All interest and dividends received after the death of the testator on investments included in his estate were dealt with by the trustees as income and paid to the testator's wife, irrespective of the period in respect of which they were paid or declared. A summons was taken out to determine (i) whether the interest and dividends comprised in the testator's estate paid after his death but in respect of periods wholly or partially antecedent to such death were apportionable, and (ii) whether the legacy duty payable from time to time in respect of the legacy of £15,000 ought to be paid out of capital or out of income of the testator's residuary estate, or partly out of each:—

HELD: (i) the only power given to the trustees to determine whether moneys were capital or income was “in cases of doubt,” and, as this was not a case of any doubt, the interest and dividends paid after the testator's death in respect of periods wholly or partially antecedent to such death ought to be apportioned between capital and income.

(ii) the legacy to the adopted daughter was a contingent legacy to which the rule in *Allhusen v. Whittell* (1) did not apply, and the legacy duty payable thereon ought to be paid out of the capital of the residuary estate.

[EDITORIAL NOTE.] It is well settled that the rule in *Allhusen v. Whittell* (1) does not apply in the case of contingent legacies, and the question here is whether certain legacies which were only payable at the discretion of the trustees were properly described as contingent, the only contingency being the exercise of the discretion by the trustees. They are held to be clearly contingent and therefore outside the rule.

AS TO THE RULE IN *Allhusen v. Whittell* (1), see HALSBURY, Hailsham Edn., Vol. 14, p. 368, para. 689; and FOR CASES, see DIGEST, Vol. 23, pp. 464-467, Nos. 5358-5372.

AS TO APPORTIONMENT, see HALSBURY, Hailsham Edn., Vol. 13, pp. 34, 35, para. 31; and FOR CASES, see DIGEST, Vol. 20, pp. 280-284, Nos. 391-429.]

Cases referred to :

- (1) *Allhusen v. Whittell* (1867), L.R. 4 Eq. 295; 23 Digest 464, 5358.
- (2) *Re Perkins, Brown v. Perkins*, [1907] 2 Ch. 596; 23 Digest 466, 5369.
- (3) *Re Poyser, Landon v. Poyser*, [1910] 2 Ch. 444; 23 Digest 466, 5371.
- (4) *Re Edwards, Newbery v. Edwards*, [1918] 1 Ch. 142; 40 Digest 677, 2135.
- (5) *Re Wills, Wills v. Hamilton*, [1915] 1 Ch. 769; 23 Digest 465, 5363.
- (6) *Sitwell v. Bernard* (1801), 6 Ves. 520; 23 Digest 415, 4861.
- (7) *Re Whitehead, Peacock v. Lucas*, [1894] 1 Ch. 678; Digest Supp.

ADJOURNED SUMMONS for the determination of questions arising out of the administration of the estate of Richard Louis Fenwick deceased.

By his will, which was dated Sept. 2, 1924, the testator, after appointing as executors and trustees thereof his wife Sylvia (who subsequently remarried and at the time of the summons herein was Sylvia Stewart, the first defendant) and Ernest Guy Fenwick and Charles Roderick Everett Fenwick, the plaintiffs herein, and after giving certain pecuniary legacies, provided by clause 7 as follows :

I give the sum of £20,000 free of duty to my trustees upon trust during the life of my adopted daughter Muriel (at present aged 18 years and residing with me) to use the whole or such part of the income thereof as they think fit for the benefit of my said adopted daughter and (within the limits permitted by law) to accumulate the remainder of such income and after the death of my said adopted daughter to hold the capital and accumulations if any of such legacy upon trust in equal shares for such of the children of my said adopted daughter and the issue of deceased children *per stirpes* and not *per capita* as survive her and attain the age of 21 and if there shall be no such children or issue then the same shall fall into my residuary estate. Provided always that at any time and from time to time during the trust hereinbefore created it shall be lawful for my trustees in their uncontrolled discretion (but during the lifetime of my wife only with her consent) to use the whole or any part of the capital and accumulations if any of the said legacy in any manner which they may think fit for the benefit of my said adopted daughter (whether on her marriage with their approval or in any other connection) or of her children and remoter issue or any of them or to make over the same to her or them or any of them absolutely.

By clause 9 of his will the testator devised his residence and land at Little Belvoir and all other his land (if any) in the county of Leicester in the manner following : (a) To his wife for her life for her separate use without impeachment of waste; (b) After the death of the survivor of himself and his wife (hereinafter called the said date) to his nephew the defendant Richard Domville Poole absolutely if he should be living at the said date, but (c) If the said Richard Domville Poole should not attain a vested interest then to his trustees upon trust for sale at such time

and in such manner in all respects as in their discretion they should think best with full powers of interim leasing management and disposal and to hold the proceeds and any net rents and income received pending a sale in trust in equal shares absolutely for such of the children of the said Richard Domville Poole as should be living at the said date and should have attained or attain the age of 21 or being female have married or marry under that age and if none of such children should attain a vested interest then in trust in equal shares absolutely for such of his nephews and nieces (other than his nephew Michael Peacocke who was otherwise well provided for) as should be living at the said date and should have attained or attain the age of 21 years or being female have married or marry under that age with a substitutional gift in favour of the children or child of any such nephews or nieces (other than as aforesaid) who should have died prior to that date.

By clause 12 of his will the testator provided :

All the remainder of my property both real and personal and wheresoever situate I give devise and bequeath to my trustees upon trust to realise the same as in their discretion they think fit and so that any reversionary interests shall not be released nor regarded as income bearing until it falls into possession unless my trustees consider that an earlier sale would be beneficial and so that all income derived from any unrealised part of my estate even of a wasting nature shall be regarded as income and no part capitalised unless my trustees consider that capitalisation is desirable and upon trust to stand possessed thereof with power to vary the investment thereof at any time within the limits hereinafter provided and to hold the same as if it were capital money arising from the sale of my Little Belvoir property hereinbefore disposed of.

And by clause 14 he provided :

My trustees shall have the following powers in addition to any other powers given to them by law or by this my will namely : (a) To hold bearer securities and securities transferable by delivery or by delivery and endorsement and to lodge all such securities with any bankers or agents in England or elsewhere for safe custody or receipt of dividends or interest without being liable for any loss occasioned by reason of any neglect or default on the part of any such bankers or agents or any of their servants ; (b) To determine in all cases of doubt whether any moneys coming into their hands are to be considered capital or income and to apportion or partition blended funds and every such determination apportionment and partition whether actually expressed or implied by the acts of the trustees shall be as binding on all beneficiaries hereunder as if the same had been made under the authority of a judge of the High Court of Justice having jurisdiction in that behalf ; (c) Instead of acting personally to employ and pay a solicitor or other person to perform any act including the receipt and payment of money in connection with the trusts of these presents including acts which a trustee could perform personally and any trustee being a solicitor or other professional person may make all their professional charges for work done by him in connection with the trusts hereof ; (d) To concur in the exercise of any powers and discretions hereunder notwithstanding that any trustee may be a person interested in the effect of such exercise.

By a codicil to his will dated Oct. 14, 1924, the testator made certain alterations in the legacies thereby bequeathed and in particular reduced from £20,000 to £15,000 free of duty the settled legacy given by clause 7 thereof for the benefit of his adopted daughter and others, but otherwise confirmed his will.

The testator died on Nov. 28, 1924, and his will was proved on Mar. 18, 1925. He was survived by his wife, and by his adopted daughter Muriel, who subsequently became Mrs. Thorneycroft. Certain sums were appropriated out of the capital of the estate to meet the settled legacy, and the whole of the income from the investment representing those sums were paid to or applied to and for the benefit of Mrs. Thorneycroft, and on the occasion of her marriage in 1929, the trustees in exercise of the powers conferred upon them by clause 7 of the testator's will raised investments to the value of about £8,515 of the investment then representing the trust legacy and settled them on her, and in further exercise of such powers the trustees from time to time raised further sums out of the capital of the trust legacy amounting in all to £330 and paid the same to Mrs. Thorneycroft.

The two questions raised by the summons as amended related (i) to the operation of the Apportionment Act, 1870, and (ii) to the operation of the rule in *Allhusen v. Whittell* (1).

The circumstances giving rise to the first question were as follows. All interest and dividends received after the death of the testator on investments included in his estate were dealt with by his trustees as income, and paid or accounted for to Mrs. Stewart, the life tenant, irrespective of the period in respect of which they were paid or declared on the footing that the language of clause 12 of the will excluded the operation of the Apportionment Act, 1870. If the estate had been dealt with on the footing that the Act was not excluded a sum of £2,500 or thereabouts would have been accredited to capital. The summons accordingly asked :

That it may be determined whether upon the true construction of the said will and codicil the interest and dividends on investments comprised in the testator's estate paid after his death but in respect of periods wholly or partially antecedent to such death were apportionable under the Apportionment Act, 1870, or the operation of the said Act was excluded so that the defendant Sylvia Stewart was entitled to the whole of such interest and dividends as income of the estate.

With regard to the operation of the rule in *Allhusen v. Whittell* (1), it appeared that legacy duty on the income of the trust legacy paid or applied to or for the benefit of the testator's adopted daughter had been paid by the testator's widow, Mrs. Stewart, for the years 1926 to 1931 inclusive, but that when she was asked for the duty as assessed for the year ending Nov. 28, 1932, she had objected that it ought properly to have been paid out of the testator's residuary estate. In addition

to the legacy duty so paid in respect of income the trustees had paid out of the capital of the residuary estate the legacy duty payable on the capital sums raised for the benefit of the testator's adopted daughter out of the £15,000, while the interest on such duty had been paid out of the income of such residuary estate. With regard to the testator's debts and funeral and testamentary expenses and the legacies bequeathed by him apart from the trust legacy, and the duties payable in respect of his estate, the whole of these payments had been made out of capital. But all interest on estate duty and the succession and legacy duties on Mrs. Stewart's life interest and also interest on a loan owing to the bank had been paid out of or charged against income.

The question asked by the summons on this point was therefore as follows :

That it may be determined whether upon the true construction of the will and codicil of the said testator

(a) The legacy duty and interest thereon already paid and hereafter to be paid in respect of the income of the trust legacy of £15,000 thereby bequeathed upon trust for the benefit of Muriel Thorneycroft and her issue accrued and to accrue due during the life of the said Muriel Thorneycroft,

(b) The legacy duty and interest thereon paid in respect of the sums which have been raised or may hereafter be raised out of the capital of the said trust legacy and paid or applied to or for the benefit of the said Muriel Thorneycroft and

(c) The testator's debts and funeral and testamentary expenses and the legacies bequeathed by him and the duty thereon and the estate duty payable in respect of his estate.

Ought to have been and to be paid or provided for out of the capital or out of the income of the testator's residuary estate or partly out of each and if so in what proportions.

C. V. Rawlence for the plaintiffs, two of the executors and trustees of the will, stated the facts.

J. H. Stamp, for the first defendant, Mrs. Stewart, the tenant for life. If this matter were *res integra* I could not contend that the formula in this will excludes either the rule in *Allhusen v. Whittell* (1) or the Apportionment Act, 1870. But with respect to the Apportionment Act, clause 14 (b) of the will on the face of it has the effect of making the actual application of the income so far as it depends on the Apportionment Act *res judicata*. The trustees, having by their acts determined that the income from the death of the testator is to belong to the tenant for life, the effect is as if a decision had been made under the authority of a judge of the High Court : see *Re Edwards, Newbery v. Edwards* (4).

The question of the application of the rule in *Allhusen v. Whittell* (1) raises three points. (i) I cannot suggest that anything in the will has the effect of excluding the rule in so far as it relates to debts and funeral and testamentary expenses and to the duties on the legacies other than the trust legacy : see *Re Wills, Wills v. Hamilton* (5). (ii) But a different question arises as to legacy duty on payments of income made under the

discretionary trust, and (iii) on payments made out of capital in exercise of the discretionary trust. These payments had not to be made at the testator's death. They were in the nature of contingent payments to be made at some unknown date, if at all, in the future. A case of that kind is not covered by the rule in *Allhusen v. Whittell* (1): see p. 303 of the report, and also *Sitwell v. Bernard* (6). That case covers this more or less accidental legacy duty becoming payable by the exercise by the trustees of their discretion. It would cause great inconvenience to give effect to the rule in *Allhusen v. Whittell* (1) in a case of this sort, and the longer the time of payment is postponed the more inconvenient it is. It also involves serious hardship on the tenant for life, because it is necessary to pile up against her accumulations of income of the unpaid legacy. If the tenant for life in *Allhusen v. Whittell* (1) had not died, it would have been impossible to give effect to the rule. For these reasons the legacy duties on this trust legacy ought to be paid entirely out of capital as and when payments of it become due.

J. Neville Gray, for the second defendant, who was entitled to capital contingently on his surviving Mrs. Stewart: With regard to the application of the Apportionment Act, this matter is not *res judicata*. The payment to the widow of the whole income during the first year was clearly wrong, and the words of clause 14 (b) cannot entitle the trustees to do what as a matter of law they must have known to be wrong. This is not a case where the trustees were in any real doubt as to what they might do. There is no suggestion that they directed their minds to the question whether their determinations between capital and income was the right thing to do. If they had it might be that I should be debarred now from objecting to their action notwithstanding that the life tenant was one of them. As it is the Apportionment Act, 1870, clearly applies.

As to the rule in *Allhusen v. Whittell* (1) it is admitted that the rule must apply to the ordinary debts and legacies.

FARWELL, J.: The only objection to the rule is as to its application to the payment of legacy duty on the settled legacy.

J. Neville Gray: Payments of duty in substance are an annuity, and there is authority that the rule does apply to payments of annuities: see *Re Perkins*, *Brown v. Perkins* (2), and *Re Poyser*, *Landon v. Poyser* (3). The fact that the legacy is discretionary makes no difference. The testator must be taken to have known that this was not a legacy on which duty had to be paid once and for all. That being so the only way to construe this legacy is as a gift of certain annual sums plus the amount of the legacy duty payable on them as these sums were to be paid free of duty. That in effect is an annuity, although until the payments have been ascertained it is impossible to say what the annuity is. To leave out the rule in this case would not do justice to capital at all. In all the cases where anything has been said about incon-

venience it has been inconvenient to apply the rule in its strict wording and some equitable adjustment has been made. All that was said in *Allhusen v. Whittell* (1) as to contingent legacies was that there was a great deal of force in the argument as to them. But this case is very different from that of a contingent legacy. There is here a sum definitely given out and out for the benefit of the adopted daughter or her issue, and although there is a question as to how far they are to have the whole income of the fund it is quite plain that the whole £15,000 is taken out of residue from the beginning.

J. H. Stamp, in reply: *Re Perkins* (2) and *Re Poyser* (3) were dealing not with legacies but with debts. As the payments in this case depend on the exercise of the trustees' discretion, it might well be that the legacy duty now payable never might have been payable because the legacies would have fallen into residue and have to be paid downright.

FARWELL, J.: Is there any authority which decides in a case in which *prima facie* the court must apply the rule that it is enough to exclude it that it involves great inconvenience?

Stamp: Not in itself. But the inconvenience caused by a legacy being contingent has been dealt with in *Allhusen v. Whittell* (1) itself, and also in *Re Whitehead, Peacock v. Lucas* (7). The inconvenience referred to in *Re Perkins* (2) becomes clear when there are two tenants for life. The rule must give way whenever the first tenant for life does not die before the payment is due to be made. Otherwise the second tenant for life is made to pay an income contribution during the life of the first tenant for life. The only way to avoid that would be to accumulate the income during the life of the first tenant for life. If it was an absolute payment there might be some fairness in doing that, but it would be unjust when the payment to be provided against was contingent.

FARWELL, J.: This summons raises certain questions in the administration of the estate of Richard Louis Fenwick which are not altogether free from difficulty. The will of the testator is dated Sept. 2, 1924, and he made a codicil to his will on Oct. 14, 1924. He died in Nov., 1934, leaving him surviving a widow, a lady who has since married and is now Mrs. Stewart and the first defendant to this summons. The will, so far as I need refer to it, makes the following provisions. It appoints the testator's widow and two other persons to be his executors and trustees, and it gives various pecuniary legacies to which I need not refer in detail. But in clause 7 of his will the testator makes a provision which I must read. [His Lordship read clause 7 of the will.] Then he provides that all pecuniary legacies bequeathed by his will or any codicil thereto shall be paid primarily out of personal estate, and he gives certain real estate in Leicestershire to his wife for her separate use without impeachment of waste, and, after the death of the survivor of himself

and his wife, to his nephew Richard Domville Poole, that is the second defendant to the summons, absolutely. Then there is a gift over in the event of the said Richard Domville Poole not obtaining a vested interest, but I need not, I think, read that. In clause 12 of his will the testator makes provisions as to the residue of his property as follows. [His Lordship read clause 12 of the will.] Then there is a provision, which I need not read, which is followed by certain powers which are given to the trustees, to two of which I must refer. These are to be found in clauses 14 (b) and (d) which provide as follows. [His Lordship read clause 14 (b) and (d) of the will.] So far as the codicil is concerned it provides for a reduction from £20,000 to £15,000 in the amount of the legacy to the testator's adopted daughter to which I have already referred, and it gives certain other legacies and otherwise confirms the will.

After the death of the testator the executors received certain moneys in respect of dividends declared before the death, and all the moneys which they so received they appear to have treated as income and not as capital, irrespective of the time for which these sums were paid. In other words they disregarded the provisions of the Apportionment Act with regard to the sums which they so received, and one of the questions that I have to determine is whether, the executors having so acted—I am not suggesting that they did so with any wrong motive—the tenant for life is now justified in saying that she was entitled, and is now entitled, to retain all these moneys so paid to her, or whether, as those persons who are interested in capital argue, that was a wrong method of treating these dividends and that they ought to have been treated as capital, with the result that an adjustment of accounts is necessary in order that these sums may be accounted for, and treated as added to the capital of the estate. On behalf of the tenant for life it is not, of course, disputed that the Apportionment Act *prima facie* applies to any sums received in respect of a period prior to the death of the testator which ought, therefore, to have been treated as capital, and that, if there were nothing in the will itself which could be said to have provided otherwise, that would necessarily be the result. Nor is it suggested that there is anything in the will which prevents the ordinary rule applying apart from the provisions in clause 14 (b) and (d), to which I have already referred. But it is said, in view of the powers given to the trustees by sub-clause (b), that they must be taken, by their acts, to have treated what was properly capital as income and, that being so, that their determination is binding on their beneficiaries, as though what they have done had been declared to be the right course to adopt by a judge of the High Court. In support of this argument reliance is placed on sub-clause (d) to show that such a determination is equally binding, notwithstanding that the tenant for life to this extent is one of the trustees. The first question, therefore, which I have to determine is whether

these two sub-clauses in clause 14 operate so as to prevent those interested in capital under this will from claiming now that the accounts must be adjusted, so as to make the administration to this extent correspond to what is the law, notwithstanding the provisions in the will. In my judgment the answer to that question must be that there must be such an adjustment. Undoubtedly, and admittedly, the sums so received during the first year after the testator's death, which were payments made in respect of periods altogether prior to his death, were capital, and ought to be treated as capital. The only power given to the trustees to determine whether moneys were capital or income is in cases of doubt, since clause 14 (b) begins with these words: "To determine in all cases of doubt where any moneys come into their hands." But the circumstances in this case which I am now considering could not raise any question of doubt in the minds of persons who must be presumed to know the law to this extent. Nor is this a case where there is any real doubt as to the effect of the provisions of the will, in which case trustees might be well advised to seek a decision of the court as to its true meaning and construction, and as to what was their duty, having regard to its terms. In this case it is impossible to suppose that anybody, knowing anything of the law at all, could have advised the trustees to take out a summons to have it determined whether such payments were capital or income, because the answer is provided by the Apportionment Act itself. As there is no question of construction or anything of that sort it is, in my view, impossible to say that there is here such a case of doubt as to give the trustees the right to exercise the power which is given to them by the will. Accordingly, in my judgment, so far as this question is concerned, the trustees have made a mistake in the way in which they have dealt with these particular sums, in that they have treated them as income when they were quite plainly capital, and to that extent the accounts must be adjusted so that capital receives these sums which ought to have been added to it, but which have in fact been paid to the tenant for life.

That deals with the first question in the summons. The second question involves a consideration of the rule in *Allhusen v. Whittell* (1), a rule which is well known in these courts and which is supposed to do, and as a rule does do, substantial justice between capital and income in dealing with liabilities of an estate, although in some cases it may produce inconvenience and even hardship. But, as I understand the present position of the authorities, the *Allhusen v. Whittell* (1) rule is one which executors and trustees and the court are bound to apply except in exceptional cases. The difficulty which has arisen in this case is in connection with the £15,000 legacy. It is to be noticed that it is a legacy of £15,000 to the trustees, in respect of which they have a complete discretion to use the income or any part of the income for the benefit of

the testator's adopted daughter Muriel, and to accumulate the remainder of the income, with a direction that on the death of the daughter the legacy is to go to her children, with this further provision that if there be no child who shall attain a vested interest the legacy is to fall into the residuary estate. There is also a provision enabling the trustees at any time, in their unfettered discretion, to take out of capital any sums that they think fit, with the consent of the wife during her life, and to pay or provide such sums for the benefit of the adopted daughter or the adopted daughter's children or any of them. In other words, the adopted daughter is not, under the terms of this will, entitled to the income of the £15,000 or any part of it. She is only entitled to such part as the trustees in their discretion see fit to pay. And she may also receive capital sums in respect of this legacy if the trustees see fit to pay them to her. On the other hand, no such payments may be made to her at all, and she may get nothing more than such part of the income as the trustees choose to pay. If she has children they will take the legacy. If there are no children this fund falls into the residuary estate. What has happened in respect to this legacy is this. The trustees, in the exercise of their discretion, have paid out to or for the benefit of the adopted daughter a considerable proportion of the £15,000, a comparatively large sum being settled on her on her marriage, with the result that the legacy is now reduced to about £6,000. In these circumstances what I have to determine is with regard to the duty which is payable from time to time in respect of this legacy. So far as the rule in *Allhusen v. Whittell* (1) is concerned the tenant for life does not suggest that that rule is not applicable and ought not to be applied so far as the debt and funeral and testamentary expenses and the ordinary legacies are concerned. She admits by her counsel that there is not sufficient here in the will to exclude the rule in respect of all the other legacies given by the will. But it is said with regard to this legacy of £15,000 and the duty upon it, that it is in effect a provision for a contingent legacy or contingent legacies, because no part of it, in certain events, might have to be taken out of residue at all. If the trustees had thought fit they need not apply any part of the income to the lady, and if the income were accumulated, and the lady were to die without having had any part of it or of such accumulations, the legacy would not go out of the estate, but would remain in without any deduction in respect of it. If that be so, it is said the rule in *Allhusen v. Whittell* (1) ought not to be applied.

With regard to contingent legacies, when one looks at the case of *Allhusen v. Whittell* (1) one sees that Wood, V.-C., in dealing with contingent legacies, does treat them as being apart from, and as having to be treated separately from, the other payments which have to be made, that is to say, the funeral and testamentary expenses, debts and legacies, and that he does apply what is now known as the rule in *Allhusen v.*

Whittell (1) to all those payments, but expressly excludes the rule from contingent legacies, the order that he made, having regard to contingent legacies, being that the tenant for life was entitled to the income arising from so much of the testator's residuary estate as might be set apart for payment of the contingent legacies. As I understand that case it is an express decision that, in regard to contingent legacies, the rule does not apply, and that the tenant for life is entitled to the whole of the income of the fund which may be set apart to pay the contingent legacies until the time when the contingency happens and the legacies become payable. In that event the legacies would have to be paid out of capital, and the tenant for life would lose the income from the date that they were so paid, but as I understand the decision of Wood, V.-C., until that happened the whole of the income of the sum so set apart would belong to the tenant for life.

It is said, on the other hand, that in such cases as *Re Perkins* (2) and *Re Poyser* (3) the exception to the ordinary rule is not applied to cases of contingent debts. I think that that is so. I think it does appear from both *Re Perkins* (2) and *Re Poyser* (3) that where there is a debt, which is a contingent debt, there is nothing in that fact to take the case out of the ordinary rule, and that the *Allhusen v. Whittell* (1) principle must be applied, notwithstanding the contingent nature of the debt. But as I read *Re Perkins* (2) and *Re Poyser* (3), neither of those cases was dealing with contingent legacies. They were both dealing with contingent debts to which, I think, different principles are applicable.

If that be so, the question that I have to determine is whether this legacy of £15,000 is a contingent legacy, properly speaking, so that according to the decision in *Allhusen v. Whittell* (1) the rule in that case does not apply, or whether in truth it is a legacy due to the trustees of £15,000 in no way contingent, that is a legacy out and out, but to be used by them in certain ways. In my judgment when one reads the will, and especially these provisions in clause 7 of the will, one can only come to the conclusion that this is in fact a contingent legacy, or rather, perhaps I should say, a series of contingent legacies. They are legacies, that is to say, as and when they are paid, of sums which may be either capital or income, which the trustees from time to time in their discretion choose to apply for the benefit of the adopted daughter. But until these sums are paid, until, that is to say, the trustees have exercised their discretion and have determined to make such payments, all that the adopted daughter is entitled to claim is that she is in the position of a person entitled to a series of legacies that are contingent upon the exercise in her favour of the discretion given to the trustees. If that be the true construction of this provision in the will I have got a case where the court is dealing with what are in truth contingent legacies, and having regard to the fact that Wood, V.-C., the judge who decided

the case which has given rise to what is now known as the rule in *Allhusen v. Whittell* (1), himself excepted from the rule contingent legacies, I think that I must follow that decision, as I do follow it, by saying that the rule applies in this case to the ordinary payments made in respect of the testator's debts and funeral and testamentary expenses and the legacies bequeathed by him, and that I must follow it further by saying that the rule does not apply to cases which are in my judgment contingent legacies or a series of contingent legacies. So I propose to hold that so far as the payment of the legacy of £15,000 and the duty upon that, which is a further legacy, are concerned, the rule does not apply, and the tenant for life is therefore entitled to the income of the sums which are provided for the legacy until it has become payable by the exercise by the trustees of the discretion which they are given.

Solicitors : *Williams & James* (for the plaintiffs and second defendant) ;
Bartlett & Gregory (for the first defendant).

[*Reported by C. M. YOUNG, Barrister-at-Law.*]

BEDDOES *v* SHAW.

[CHANCERY DIVISION (Bennett, J.), July 3, 1936.]

Mortgage—Priority—Equitable interests—Ranking in order of time—Law of Property Act, 1925, (c. 20), s. 113.

In April, 1924, A. gave a firm of solicitors £2,000 to invest upon mortgage and that sum was duly invested in the mortgage of a farm. In 1931 B. gave the same solicitors instructions to invest £2,000, being B.'s money then in their hands, upon mortgage, and B.'s case was that the above mortgage had, in the books of the solicitors at any rate, been transferred to him. In 1932, C. gave similar instructions to the solicitors who purported to invest £2,000 upon the same mortgage in favour of C., and after pressure C. obtained the deeds of the property and the mortgage and an acknowledgment in writing by the solicitors that the mortgage debt belonged to her and an undertaking to transfer the security upon request. A.'s executors, B., and C. each claimed the mortgage debt. It was admitted that all three parties had not at any time any notice of the other's equitable claim to the security:—

HELD: (i) Law of Property Act, 1925, s. 113 did not affect the position here, that section being concerned mainly with relieving persons investigating titles.

(ii) the interests being equitable, that earlier in time prevailed, and A.'s executors were entitled to the debt and all securities therefor.

(iii) the legal interest in the debt being in the solicitors (who were not parties to this action), the order must be without prejudice to the rights of them or those representing them, if they made any beneficial claim to the debt.

[EDITORIAL NOTE. The maxim *qui prior est tempore, potior est jure* has not been affected by the enactment of the Law of Property Act, 1925, s. 113. The section was enacted principally for the relief of persons examining or deducing title, and where the legal estate is outstanding, equal equities still rank in priority of time.

FOR THE RULE THAT EQUITIES RANK IN ORDER OF TIME, see HALSBURY, Hailsham Edn., Vol. 13, pp. 96-98, paras. 88, 89; and FOR CASES, see DIGEST, Vol. 20, pp. 305-309, Nos. 586-613 and Vol. 35, pp. 449-453, Nos. 1903-1941.]

ACTION for a declaration that the plaintiff was entitled to a mortgage debt of £2,000 and interest thereon and all securities therefor and for delivery up of the mortgage deed by the defendant Mrs. Gregory. The facts which are fully set out in the judgment were shortly as follows: Ferrington and Jackson, solicitors, in 1924 having £2,000 belonging to Job Beddoes in their hands invested it on his behalf on a mortgage of Pantglas Farm. Job Beddoes died later in 1924 and the plaintiff is his surviving executor. In 1931 Jackson, practising as Ferrington and Jackson (Ferrington having died in 1929) had a similar sum to invest on behalf of the defendant Shaw and the latter contended that in their books, Ferrington and Jackson, in effect, equitably transferred the mortgage to him. In 1932 there was a precisely similar equitable transfer to Mrs. Gregory. Jackson was adjudicated bankrupt in 1934, but his trustee in bankruptcy made no claim to any beneficial interest in the sum of £2,000. The question to be decided was, the facts being

admitted, which of the three parties had the better claim to the mortgage debt.

L. M. Jopling for the plaintiff.

G. P. Slade for the defendant, Mr. Shaw.

H. Johnston for the defendant, Mrs. Gregory.

BENNETT, J.: This is an action between Hannah Beddoes, the plaintiff, and Arthur Shaw and Fanny Owen Gregory, the defendants. The question to be decided is who is entitled to a mortgage debt of £2,000 secured by a mortgage, dated Apr. 11, 1924, granted by one Mary Jones to George William Ferrington and Harry Jackson for the securing of that debt, on property known as Pantglas Farm. The debt, it seems to me, is at law vested either in one Harry Jackson or his trustee in bankruptcy, but I understand the solicitor for Harry Jackson and his trustee in bankruptcy has stated that neither of them make any beneficial claim. I think, however, any declaration I make must be expressed to be without prejudice to any claim of either.

This case falls to be decided almost entirely upon admissions made by the parties with a view to saving expense. In April, 1924, two gentlemen, Ferrington and Jackson, were practising together as solicitors and they had a client Job Beddoes, the husband of the plaintiff. It is admitted that on Apr. 10, 1924, Job Beddoes paid Ferrington and Jackson £2,000. It is admitted that the £2,000 was paid by Job Beddoes to Ferrington and Jackson in order that it might be temporarily invested on security. On Apr. 11, 1924, Ferrington and Jackson advanced to Mrs. Jones £2,000 out of moneys stated to belong to them on joint account. The money was secured on Pantglas Farm. That money and the security for it are now in dispute between the parties.

Job Beddoes died on Sept. 30, 1924, and on Feb. 14, 1925, probate of his will was granted to the plaintiff and William Jones Gregory, his cousin, a clerk employed in the offices of Ferrington and Jackson. Ferrington and Jackson admitted to the plaintiff that Mrs. Jones's mortgage formed part of her husband's estate, and they paid Mrs. Beddoes, the plaintiff, interest on this mortgage and in the year 1932 they sent her moneys and an account of her income including interest on this mortgage debt.

Mr. Ferrington is now dead. He died in 1929 and Jackson was adjudicated bankrupt in 1934. On the basis of those facts the plaintiff claims as surviving executor and trustee of the will of Job Beddoes that she is entitled to the sum of £2,000 and interest; her case resting upon an equitable title resulting from what is in effect a declaration of trust.

Mr. Shaw also claims the debt and security. His case is that in April of 1931, seven years after Job Beddoes paid £2,000, he had £2,000 in the

hands of that firm ; and his case is that Ferrington and Jackson, in their books, treated his £2,000 as having been used to pay off the £2,000 of Job Beddoes ; and that thereafter Ferrington and Jackson were paying him interest on the mortgage and admitted that they held for him this mortgage debt and the securities. This claim rests upon a declaration of trust—or something equivalent—subsequent in point of time to the plaintiff's.

The defendant Fanny Owen Gregory's case arises from facts that occurred in 1932 admitted by the plaintiff's solicitors. The facts are set out in paras. 3 and 4 of her defence. In July, 1932, she with a view to the investment of the proceeds of sale on mortgage sold certain war stock through her solicitor, Harry Jackson, practising as Ferrington & Jackson. The proceeds of sale amounting to £2,025, were credited to her in the books of Ferrington & Jackson and she was informed by the firm that £2,000 of the said £2,025 had been invested by the said firm for her on mortgage of Pantglas Farm, being the property comprised in the said mortgage of Apr. 11, 1924. She pressed the firm to deliver the title deeds and mortgage to her and they were in fact delivered with a certificate attached in the following terms : " We hereby certify that the sum of £2,000, the principal money owing on the attached security is the money of and belongs to you. And we undertake at your request to transfer the security into your name and to pay you the interest thereon at 5 per cent. as and when received." Thereafter and until the bankruptcy of Harry Jackson, she received the interest on the mortgage and she still retains the mortgage and title deeds. She had no notice that Harry Jackson was a trustee of the money secured by the mortgage and dealt with him in good faith and was entitled to assume that he could give her a valid receipt and deal with the mortgage debt and premises.

All three parties before the court have an equitable claim to the mortgage debt and the mortgage security arising at different dates on declarations of trusts or their equivalent made by the legal estate owner ; the plaintiff being the first in point of time and Gregory last in point of time.

Curiously enough though last in time she claims to come first, saying that the old rule of *qui prior est tempore potior est jure* must now be construed to mean by virtue of the Law of Property Act, 1925, s. 113, that he who is last in time is in a better position than he who is first in time. Sect. 113 says :

(1) A person dealing in good faith with a mortgagee, or with the mortgagor if the mortgage has been discharged released or postponed as to the whole or any part of the mortgaged property, shall not be concerned with any trust at any time affecting the mortgage money or the income thereof, whether or not he has notice

of the trust, and may assume unless the contrary is expressly stated in the instruments relating to the mortgage—

(a) that the mortgagees (if more than one) are or were entitled to the mortgage money on a joint account; and

(b) that the mortgagee has or had power to give valid receipts for the purchase money or mortgage money and the income thereof (including any arrears of interest) and to release or postpone the priority of the mortgage debt or any part thereof or to deal with the same or the mortgaged property or any part thereof; without investigating the equitable title to the mortgage debt or the appointment or discharge of trustees in reference thereto.

(2) This section applies to mortgages made before or after the commencement of this Act, but only as respects dealings effected after such commencement.

(3) This section does not affect the liability of any person in whom the mortgage debt is vested for the purposes of any trust to give effect to that trust.

It has been argued on behalf of Mrs. Gregory that she was dealing in good faith with the mortgagee and that she was therefore not concerned with any trust at any time affecting the mortgage money; and that she was entitled to assume that the trustee had power to give valid receipts for the purchase or mortgage money and the income thereof, including interest, and to release or postpone the priority of the mortgage debt or any part thereof or to deal with the same or the mortgaged property or any part thereof; without investigating the equitable title to the mortgage debt or the appointment or discharge of trustees in reference thereto; and that therefore, that being so, she gets a better title than someone equal but earlier in time.

The fallacy that underlies this argument is the suggestion that sect. 113 was intended to alter the law with regard to equitable titles, when in fact it was mainly concerned with relieving persons investigating titles; and was not intended to affect the interests they acquired. If a person acquired a legal interest he got it unaffected by notice of any trust; but if he acquired an equitable interest there is nothing in the section which gives him priority over other holders equal to himself but earlier in time. I cannot hold to be law the proposition so ably presented by Mr. Johnston, which would have the startling effect, when the equities are equal, of making the best title lurk in him who is last in point of time.

There was one point advanced on behalf of the defendant Arthur Shaw by Mr. Slade which depended upon his being able to establish that the firm of Ferrington & Jackson were general agents of Job Beddoes until he died and then of the plaintiff and her co-executor Gregory. There are no facts on which it would be possible for me to draw the inference that there ever was any such relation.

Prefacing my judgment by a declaration that it is without prejudice to any rights of Harry Jackson or his trustee in bankruptcy, I declare that the plaintiff as the surviving executor of Job Beddoes is entitled to the sum of £2,000 and interest thereon and the benefit of all securities

and the estate and interest in the mortgage property and I make an order on Mrs. Gregory to deliver up the mortgage deed. The counter-claim of Mr. Shaw must be dismissed and the defendants must pay the costs.

Solicitors: *Gregory, Rowcliffe & Co.*, agents for *Harrison & Sons, Welshpool* (for the plaintiff); *Field, Roscoe & Co.*, agents for *Minshall, Pugh & Co.*, Oswestry (for the defendant, Mr. Shaw); *Gibson & Weldon*, agents for *Crampton Pym*, Oswestry (for the defendant, Mrs. Gregory).

[Reported by REGINALD TOWNSEND, ESQ., Barrister-at-Law.]

W——, M. J. v. W——, H. R. W.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Bucknill, J.), **June 16, 1936.**]

Divorce—Intervention after decree nisi—Woman named—No application to intervene in suit—Member of the public—"Person"—Supreme Court of Judicature (Consolidation) Act, 1925 (c.49), s. 183 (2)—Divorce Rules, 1924, rr. 17, 18, 19.

A wife's petition for divorce contained the usual notice to the woman named to enter an appearance and obtain leave to intervene. The woman took no steps in the proceedings, the suit was undetended, and a decree *nisi* pronounced on June 27, 1935. On Feb. 22, 1936, no step having been taken to have the decree made absolute, an appearance to show cause against the decree being made absolute was entered by A.B. (a name quite different to that of the woman named in the petition) intervening as a member of the public under Judicature (Consolidation) Act, 1925, s. 183 (2), and stating by affidavit that she was the same person as the woman named. By the affidavit she also stated that the suit was a collusive one and that, in fact, no adultery had been committed. The intervener subsequently took out a summons for directions for the trial of her intervention. The husband and wife then filed affidavits denying collusion and the husband re-affirmed the adultery. The husband then took out a summons to strike out the appearance as a member of the public of the woman named:—

HELD: as the woman named had not applied for leave to intervene she had not become a party to the suit, and was entitled to intervene at any time before the decree was made absolute.

[EDITORIAL NOTE. For the protection of the court in dealing with matters of divorce wide powers of intervention are given by statute. Any member of the public may intervene after the decree *nisi* has been made until such time as it is made absolute. This provision has always been construed not to apply to a party to the suit, and this case decides for the first time that a "woman named" is not a party unless she has applied for leave to intervene.

AS TO INTERVENTION AFTER DECREE NISI BY MEMBERS OF THE PUBLIC, see HALSBURY, Hailsham Edn., Vol. 10, pp. 774, 775, paras. 1224, 1225; and FOR CASES, see DIGEST, Vol. 27, p. 487, Nos. 5185-5193.]

Cases referred to:

- (1) *Stoate v. Stoate* (1861), 2 Sw. & Tr. 384; 27 Digest 480, 5085.
- (2) *Howarth v. Howarth* (1884), 9 P.D. 218; 27 Digest 492, 5250.

- (3) *Harries v. Harries & Gregory* (1901), 86 L.T. 262 ; 27 Digest 480, 5090.
(4) *Harrop v. Harrop*, [1899] P. 61 ; 27 Digest 389 ; 3840.
(5) *Sloggett v. Sloggett*, [1928] P. 148 ; Digest Supp.
(6) *Lautour v. Queen's Proctor* (1864), 10 H.L.Cas. 685 ; 27 Digest 367, 3533.

SUMMONS taken out by the respondent husband to strike out an appearance entered by the woman named for the purpose of preventing the decree *nisi* in the suit from being made absolute. The woman named intervened in the capacity of a member of the public with the object of showing that the case had been a collusive one and the only point before the court on the hearing of the summons was whether a woman named came within the description of "any person" as used in the Judicature (Consolidation) Act, 1925, s. 183 (2), and was not to be deemed a party to the suit, which would have precluded her from taking advantage of the section.

Noel Middleton, K.C., and Clifford Mortimer for the husband. Walter Frampton, and J. F. Compton Miller for the wife.

S. Parnell Kerr, for the intervener, the woman named in the suit.

BUCKNILL, J. : In this matter the question which the court has to decide is whether a woman whom the petitioner has named in her petition for divorce as the woman with whom her husband has committed adultery, is entitled to intervene after decree *nisi* to show cause against the decree *nisi* being made absolute. The material section is the Judicature (Consolidation) Act, 1925, s. 183 (2), and is as follows :

(2) After the pronouncing of the decree *nisi* and before the decree is made absolute, any person may, in the prescribed manner, show cause why the decree should not be made absolute by reason of the decree having been obtained by collusion or by reason of material facts not having been brought before the court, and in any such case the court may make the decree absolute, reverse the decree *nisi*, require further inquiry or otherwise deal with the case as the court thinks fit.

This section in substance re-enacts the Matrimonial Causes Act, 1860, s. 7.

The relevant facts which raise the matter in issue are that on Feb. 6, 1935, the petitioner filed a petition for the dissolution of her marriage with the respondent on the ground of his adultery with the woman named. The adultery was alleged to have taken place at 9, Pembroke Place, Kensington, and on Nov. 20-24, 1934, at the Charing Cross Hotel. The petition contained the usual notices addressed to the respondent and the woman named in the petition. The notice to the woman named was as follows :

Take notice that you are entitled within eight days after delivery hereof to you inclusive of the day of such delivery to apply upon summons for leave to enter an appearance . . . for leave to intervene in this cause.

The respondent duly appeared by his solicitor to the petition. The petition was served on the woman named and she signed an admission on the copy petition that she was the woman named, but she did not apply for leave to enter an appearance. The respondent filed no defence and the petition was undefended. On June 27, 1935, I pronounced a decree *nisi*. At the hearing the only evidence was of adultery at the Charing Cross Hotel. In accordance with precedent the decree *nisi* merely stated that the respondent had been guilty of adultery and did not refer to any woman's name as being the person with whom the husband had committed adultery.

When six months had expired from the date of the decree *nisi* the petitioner did not take the necessary steps to get the decree *nisi* made absolute. On Feb. 22, 1936, solicitors appeared in the divorce proceedings for one A.B., the appearance being stated to be on behalf of a member of the public to show cause against the decree *nisi* being made absolute. On Feb. 25, 1936, A.B. filed an affidavit in support of her intervention. The gist of this affidavit was that she swore that she was the woman named in the suit, and that she and the respondent agreed to supply evidence to the petitioner so that she might divorce her husband, and in pursuance of this agreement she and the respondent went to the Charing Cross Hotel on Nov. 20, for three nights, but that no sexual intercourse took place between them and she in fact had never committed adultery with the respondent.

In due course the intervener took out a summons addressed to the petitioner to show cause why an order should not be made for directions upon the issues raised by her intervention in the suit. On the hearing of this summons, I directed that a copy of the summons should be served upon the respondent, and at the adjourned hearing ordered that the summons should be adjourned into open court for argument. The respondent filed an affidavit in which he swore that he had in fact committed adultery with the intervener at the Charing Cross Hotel, and that there was no collusive arrangement of any sort between himself and his wife as to the bringing of divorce proceedings. The petitioner also swore an affidavit in which she swore that there was no collusive arrangement of any sort between her and her husband.

Before the further hearing of the summons for directions, the respondent took out a summons to show cause why the appearance entered on Feb. 22 by a member of the public, namely, A.B., should not be struck out, and it is on the hearing of this summons that the present matter in issue has to be decided by the court. As I have already said the point is whether a woman named in a divorce petition comes within the description of "any person" as used in the Judicature (Consolidation) Act, 1925, s. 183 (2).

Having regard to the general words "any person" used in the section

it appears to me that the burden is cast upon the respondent to satisfy the court that the intervener is not included in the words "any person." Counsel on behalf of the respondent argued that "any person" in the section meant any member of the public and that the intervener was not a member of the public because she was in fact the woman named in the petition, and had been served with it. I was referred in argument to three cases in which the court has considered the application of the words "any person" in the statute. In 1861 in *Stoate v. Stoate* (1), the judge ordinary, SIR CRESWELL CRESWELL, decided that a respondent against whom a decree *nisi* for dissolution of marriage had been pronounced, had no right under the Matrimonial Causes Act, 1860, s. 7, to show cause against the decree *nisi* being made absolute and that her proper remedy was to apply for a new trial. In 1884 the decision in *Stoate v. Stoate* (1) was quoted in argument and approved by the Court of Appeal in *Howarth v. Howarth* (2), where it was held that the uncle of the respondent might intervene under the Matrimonial Causes Act, 1860, s. 7, unless he was acting merely on behalf of the respondent. In that case BAGGALLAY, L.J., at p. 224, said :

It appears to me, therefore, that assuming [the uncle] to be an independent intervener, not an intervener acting in collusion or by arrangement with either of the parties to the suit, there were circumstances which would justify the intervention.

Again at p. 223 BAGGALLAY, L.J., pointed out :

Until the Act 23 & 24 Vict. c. 144, this right of intervention did not exist, but by that Statute provision was made for intervention in one of two ways, the one being by the intervention of any third party, the other being by intervention of the Queen's Proctor.

LINDLEY, L.J., at pp. 228 and 229 said :

Let us consider the meaning "any person." It has been decided, and properly, that "any person" does not include the respondent. The respondent has other means of applying to the court besides availing himself of this intervention proceeding . . . so far as I know "any person" means anybody except the respondent and somebody who is the respondent in disguise, his agent or his puppet.

In 1901 it was decided that the co-respondent is not "any person" within the meaning of the section. In *Harries v. Harries* (3) a co-respondent in a divorce petition endeavoured to intervene under sect. 7 of the Act of 1860. He had entered an appearance but had not defended the suit. GORELL BARNES, J., as he then was, decided that a respondent cannot intervene under sect. 7 of the Act of 1860 and said, at pp. 262, 263 :

A respondent cannot intervene to prevent a decree *nisi* being made absolute. The authorities are clear upon the point. . . . a co-respondent is in no better position than a respondent. It seems to me a novel idea that a co-respondent should seek to intervene as a member of the public.

It is, however, important to note that GORELL BARNES, J., was dealing with the case of a co-respondent who had actually appeared in the proceedings. Having regard to those three cases it appears to me that the question which I have to decide is whether the facts of this case were such as to constitute the intervener a party to the divorce proceedings.

When *Harries v. Harries* (3) was decided the court had power to direct that a woman named in the petition as to the person with whom the respondent had committed adultery be made a party under the Matrimonial Causes Act, 1857, s. 28. That section enacted in effect that on every petition presented by a wife for dissolution of marriage the court, if it saw fit might direct that the person with whom the husband was alleged to have committed adultery be made a respondent.

The result of this section as GORELL BARNES, J., pointed out in *Harrop v. Harrop* (4), at pp. 62, 63, was that :

the husband seeking to obtain a dissolution of marriage is bound to make the adulterer a co-respondent. The court may make the adultress a respondent when the wife seeks similar relief.

In 1907 it was enacted by the Matrimonial Causes Act, 1907, s. 3, that :

in every case, not already provided for by law, in which any person is charged with adultery with any party to a suit, or in which the court may consider, in the interest of any person not already a party to the suit, that such person should be made a party to the suit, the court may, if it thinks fit, allow that person to intervene upon such terms (if any) as the court may think just.

This section has been repealed and has been replaced by the Judicature Act, 1925, s. 197.

The machinery for obtaining leave to intervene in a case such as this is now contained in the Matrimonial Causes Rules, 1924, rr. 17, 19. Rule 17 is as follows :

Where a husband is charged with adultery with a named person a sealed copy of the pleading containing such charge shall be delivered to the person with whom adultery is alleged to have been committed, indorsed in lieu of notice to appear with notice that such person is entitled within eight days after delivery thereof to apply for leave to intervene in the cause. Such delivery and notice may only be dispensed with by order upon summons for cause shown.

Rule 19 is as follows :

Parties intervening must join in the proceedings at the stage at which they find them unless otherwise ordered by a registrar.

Service on a person with whom a husband is charged with adultery, is personal and must be proved by the usual affidavit, unless such person shall have intervened.

It was argued that mere service of the petition upon the woman named made her a party by virtue of the Judicature Act, 1925, s. 225. This section enacts that

in this Act, unless the context otherwise requires the following expressions have the meanings hereby assigned them. . . "Party" includes every person served with notice of or attending any proceeding, although not named on the record.

I do not think that the argument that mere service of the petition upon the woman named makes her a party is sound. If she becomes a party then she has presumably the right to take part in the proceedings. If so then mere service would in effect make it unnecessary for her to apply for leave to intervene, but under the statutes she has no absolute right to intervene, but merely has a right to apply for leave to intervene under the Judicature Act, 1925, s. 197, or she may be made a respondent by order of the court under the Judicature Act, 1925, s. 177 (2), which enacts :

On a petition for divorce presented by the wife the court may, if it thinks fit, direct that the person with whom the husband is alleged to have committed adultery be made a respondent.

If the proceedings for divorce were a personal matter between the parties alone, it would, I think, be unjust and contrary to public policy which requires that litigation if possible should not be unduly prolonged, that a woman in the position of the intervener in this case should be allowed to intervene after the hearing of the case. Her opportunity to apply for leave to intervene arose as soon as the petition was brought to her notice, and she should have acted then. But the legislature by the various statutes that have been passed has clearly indicated that proceedings for divorce are not merely a personal matter but are also a matter of public interest. The Judicature Act, 1925, s. 178, states that on a petition for divorce it becomes the duty of the court to satisfy itself so far as it reasonably can as to the facts alleged. In this connection LORD MERRIVALE, P., in *Sloggett v. Sloggett* (5), at p. 153, when dealing with that section, said :

Contrary to the ordinary course of trial of civil proceedings the court, is required not only to deal with issues raised by the parties, but with independent matters deemed by the legislature fit to be dealt with, in respect of a larger interest, that namely of the community.

It is a matter of public interest that a decree for dissolution of marriage should not be obtained on evidence which has been manufactured so as to indicate adultery where none in fact has taken place.

The Act of 1860, as LORD WESTBURY pointed out four years later, in *Lautour v. Queen's Proctor* (6), at p. 699, was passed with the object of giving the whole of the public as well as the Queen's Proctor

the power to give information to the court in the interval between the decree *nisi* and the decree absolute, which would relieve the court from being misled by the petitioner and from pronouncing a decree in circumstances where the petitioner was not entitled to such a decree. The Act has effected this purpose by introducing a period of time between decree *nisi* and decree absolute during which the King's Proctor or any person may intervene. After the Act of 1860 was passed I think a woman named in the petition would have been entitled to intervene after the decree *nisi* if the court had not made her a respondent to the suit under the Act of 1857. I do not think that the fact that the woman named now has the petition served upon her makes any substantial difference to her position unless she in fact applies for leave to appear to the proceedings before decree *nisi* and obtains leave to intervene. Once she has done that then I think she does become a party to the suit in fact, and has no right to intervene after decree *nisi* under sect. 183. If the argument put forward on behalf of the petitioner were right, the result would be to take away from a woman an important statutory right, to intervene after decree *nisi* in a matter of public interest, namely, a proceedings for divorce, merely by service on her of the petition for divorce, in which she is mentioned as being the woman with whom the respondent has committed adultery.

In my view a woman so named in a petition does not become a party to the proceedings, until she has applied for leave and has obtained leave to intervene, and mere service of the petition upon her without any subsequent action on her part does not make her a party. Unless and until the woman has obtained leave to intervene she remains within the class of "any person" referred to in the section, and therefore, has the right to show cause after decree *nisi* which the section has given her. After the woman has obtained leave to intervene, her right under sect. 183 disappears in accordance with the decisions to which I have referred because she then becomes a party to the suit.

For these reasons this summons is dismissed.

Solicitors: *J. B. de Fonblanque* (for the husband), *Braikenridge & Edwards* (for the wife), *Piper, Smith & Piper* (for the intervener).

[Reported by J. F. COMPTON MILLER, ESQ., Barrister-at-Law.]

Re PATTEN, OFFICIAL RECEIVER v. PATTEN.

[CHANCERY DIVISION (Luxmoore, J.), July 6, 13, 14, 1935.]

Executors—Retainer—Loans to husband for purposes of business—Bankruptcy Act, 1914 (c. 59), ss. 36, 130 (8), (9)—Administration of Estates Act, 1925 (c. 23), s. 34 (1), sched. I.

A wife advanced to her husband, in various amounts, a sum of £432 10s. for the purposes of his business. After his death she was on Jan. 19, 1935, granted letters of administration to his estate, and she received sums amounting to £432 10s. as such administratrix and paid them on Feb. 1, 1935, into her own private banking account, in satisfaction, it was alleged, of the advances above referred to and in the exercise of her power of retainer. On Feb. 8, 1935, an order was made for the administration of the estate in bankruptcy. The Official Receiver on motion asked for a declaration that the administratrix had no power to retain such sum of £432 10s. and that it should be paid over to him. For the administratrix it was contended that the sum in question had ceased to be part of the estate of the deceased on Feb. 1, 1935, and that for that reason the Official Receiver had no title to the money:—

HELD: (i) the administratrix had no right of retainer in respect of the debt for money lent for the purposes of her husband's business.

(ii) there being no right of retainer, she could not by paying the money into her own account appropriate it to her debt and it therefore on Feb 8 still formed part of the deceased's estate, and the Official Receiver was entitled to the declaration asked for.

[EDITORIAL NOTE. This case resolves a point left over by the decision in *A.-G. v. Jackson* (4). The point was: did not that decision in effect overrule the decision in *Re Ambler* (1)? It is now held that it did, and that in respect of loans made to a husband by a married woman, the latter on becoming her husband's personal representative has no right of retainer if his estate is insolvent.

FOR THE LAW ON THE POINT, see HALSBURY, Hailsham Edn., Vol. 14, p. 324, para. 619, and FOR CASES, see DIGEST, Vol. 23, pp. 378, 379, Nos. 4480–4485.]

Cases referred to:

- (1) *Re Ambler, Woodhead v. Ambler*, [1905] 1 Ch. 697; 23 Digest 379, 4485.
- (2) *Re May, Crawford v. May* (1890), 45 Ch. D. 499; 23 Digest 379, 4484.
- (3) *Re Leng, Tarn v. Emmerson*, [1895] 1 Ch. 652; 23 Digest 383, 4535.
- (4) *A.-G. v. Jackson*, [1932] A.C. 365; Digest Supp.
- (5) *Re Rhoades, Ex p. Rhoades*, [1899] 2 Q.B. 347; 4 Digest 505, 4549.

SPECIAL CASE stated by the judge of the Staffordshire County Court under the Bankruptcy Act, 1914, s. 100 (3) for the opinion of the High Court. The matter raised by the case is shortly stated as follows: A widow had made loans to her husband for the purposes of his business in his lifetime and, his estate being insolvent, she exercised her right of retainer in respect of this debt. It was contended that since the decision in *A.-G. v. Jackson* (4) there was no right of retainer in such circumstances.

W. F. Waite, for the Official Receiver: The question is whether the decision in *Re Ambler* (1) has been definitely overruled by *Jackson's*

case (4). If *Ambler's* case (1) is still law it is admitted the administratrix having a right to retain may exercise such right notwithstanding the making of an administration order vesting the assets then undisposed of in the Official Receiver as trustee in bankruptcy. But the opinions of LORD ATKIN and of LORD TOMLIN in *Jackson's* case (4) clearly show that, though retainer was claimed in priority to a claim made by the Crown, the principle upon which retainer was disallowed is equally applicable to defeat the retainer claimed by the widow in *Ambler's* case (1) and therefore *Ambler's* case (1) cannot any longer be regarded as law.

R. A. Willes, for the respondent: The Official Receiver's title depends upon the provisions of the Bankruptcy Act, 1914, s. 130, which by subsect. (8) expressly saves any payment made or any act, matter or thing done in good faith before the date of the administration order. The result is that the Official Receiver can claim only assets undisposed of at the date of the administration order: see *Re Rhoades* (5). It is therefore immaterial, so long as the administratrix acted in good faith, whether the payment she made can be justified under the authority of *Re Ambler* (1) or whether that case is overruled by *Jackson's* case (4). But if that question is now material, *Re Ambler* (1) is distinguishable from *Jackson's* case (4) in that, though the right to prefer may have been interfered with by statute, the wholly distinct right to retain has not been so affected and remains available to a widow administratrix.

LUXMOORE, J.: On May 23, 1936, the judge of the Staffordshire County Court, at the request of both parties to the motion in the matter of the estate of Sydney Patten, deceased, determined, in accordance with the provisions of the Bankruptcy Act, 1914, s. 100 (3), to state the facts in the form of a special case for the opinion and determination of the High Court, and to transmit the proceedings to the High Court accordingly.

The material facts are as follows: From Jan. 12, 1933, to his death on Oct. 16, 1934, Sydney Patten carried on business as an animal trap manufacturer. On various dates between Jan. 13, 1933, and Apr. 19, 1934, his wife, who is the respondent in the proceedings, advanced to her husband, for the purposes of his business, various sums amounting, in the aggregate, to £432 10s. Sydney Patten died intestate, and on Jan. 19, 1935, letters of administration to his estate were granted to the respondent. Sydney Patten's estate included, among other things, a policy of insurance on his life in the London & Manchester Insurance Company. On Jan. 31, 1935, the respondent received from the insurance company the sum of £396 15s. 2d. On Feb. 1, 1935, she paid this sum, together with other moneys in her hands as administratrix of her husband's estate amounting in all to the total sum of £432 10s. to her private account. On Feb. 8, 1935, an order was made upon a petition

presented by the respondent, under the provisions of the Bankruptcy Act, 1914, s. 130 (9) for the administration of her husband's estate in bankruptcy. Mr. Willes, who represented the administratrix before me, admitted that this sum of £432 10s. was, at the date of the making of the order, still in her hands. On Apr. 21, 1936, the Official Receiver, as trustee of Sydney Patten's estate, served the widow with a notice of motion asking for a declaration that under, and by virtue of, the joint effect of the Married Women's Property Act and the Administration of Estates Act, 1925, or otherwise, the respondent is not entitled to retain out of the estate the sum of £432 10s., or any part of it, and for an order that the respondent pay the sum of £432 10s. to the Official Receiver. It was agreed by counsel that the declaration as asked did not, in terms, cover every possible contention, and in order that every point might be covered they agreed that the declaration should be treated as amended by adding at the end of it the words :

and that in the events mentioned in the special case the Official Receiver is entitled to repayment of the said sum of £432 10s.

They also agreed that the special case should be treated as amended by adding a statement to the effect that the £432 10s. remained in the hands of the respondent on Feb. 8, 1935.

Mr. Willes argued that no question as to the respondent's right of retainer can arise in the present case. He contended that the Official Receiver has no title to the money because it had ceased to form part of the estate of Sydney Patten on Feb. 1, 1935, that is before the order of Feb. 8, 1935, was made. He relied on the words of sect. 130 (8). The subsection is in terms applicable to the case where a creditor of the deceased debtor presents a petition for the administration of his estate according to the law of bankruptcy, but I think that it is plain, on the construction of the whole section, that subsect. (8) also applies to the case where the petition is presented under subsect. (9) by the legal personal representative of the deceased debtor. Subsect. (8) provides that notice of the presentation of a petition under the section shall, in the event of an order for administration being made thereon, be deemed to be equivalent to notice of an act of bankruptcy, and after such notice no payment or transfer of property made by the legal personal representative shall operate as a discharge to him as between himself and the Official Receiver or trustee. The subsection continues in these words :

save as aforesaid nothing in this section shall invalidate any payment made or any act or thing done in good faith by the legal personal representative before the date of the order for administration.

Mr. Willes contends that as the respondent transferred the £432 10s. to her own account before Feb. 8, 1935, the Official Receiver can have no title to that sum, or any part of it. I think it is clear that if the

respondent had paid this sum in satisfaction of the debt or debts of creditors of the estate other than herself the section would have applied. The substantial question is whether the transfer of the money to her private account enables her to say that this sum no longer forms part of her husband's estate. If it is still part of his estate then the Official Receiver is entitled to recover it, for it was in her hands on the date when the order of Feb. 8, 1935, was made. The answer to the question depends on a further question: Had the respondent a right of retainer as against the other creditors of the estate on Feb. 1, 1935? If she had, the money became hers on that date. If she had not, then the money remained in her hands as part of the intestate's estate, and the title to it was not affected by the transfer of the money from her account as administratrix to her own private account.

The money was admittedly owing to her in respect of loans made by her to the intestate for the purposes of his business. By the Bankruptcy Act, 1914, s. 36 (2), it is provided that:

Where the husband of a married woman has been adjudged bankrupt, any money or other estate of such woman lent or entrusted by her to her husband for the purpose of any trade or business carried on by him or otherwise, shall be treated as assets of his estate, and the wife shall not be entitled to claim any dividend as a creditor in respect of any such money or other estate until all claims of the other creditors of her husband for valuable consideration in money or money's worth have been satisfied.

In other words, the wife is postponed in the manner stated to the other creditors, and the other creditors are, to that extent, given a priority over her debts. This section replaces the Married Women's Property Act, 1882, s. 3, which is repealed by the Bankruptcy Act, 1914. By the Administration of Estates Act, 1925, s. 34, it is provided by subsect. (1):

Where the estate of a deceased person is insolvent, his real and personal estate shall be administered in accordance with the rules set out in sched. I, part I to this Act.

That first schedule provides that the first, testamentary and administration expenses shall have priority, and, secondly, reading it quite shortly as it applies to this case, that:

Subject as aforesaid, the same rules shall prevail and be observed . . . as to the priorities of debts and liabilities as may be in force for the time being under the law of bankruptcy with respect to the assets of persons adjudged bankrupt.

It was decided by the Court of Appeal in *Re Ambler* (1), purporting to follow *Re May* (2) and *Re Leng* (3), that the Married Women's Property Act, 1882, s. 3, did not affect the right of retainer of a married woman who is the legal personal representative of her deceased husband in respect of a loan made by her for business purposes, and that although

that section, read in combination with the Judicature Act, 1875, s. 10, prevents a wife from proving for such a loan in the administration of her deceased husband's estate, if insolvent, in competition with his creditors for value, yet if she is her husband's executrix she can, as against those creditors, retain the amount of the loan out of assets in her hands as executrix. As I have said, the Married Women's Property Act, 1882, s. 3, is replaced by the Bankruptcy Act, 1914, s. 36, and the Judicature Act, 1875, s. 10, has also been replaced by the Administration of Estates Act, 1925, s. 34 and sched. I, part I, but there is no substantial difference in the verbiage of the old sections and those which have replaced them. The decision in *Re Ambler* (1) had this result, that although a wife's loan to her husband for business purposes is postponed by statute to the other creditors for the purposes of dividend where the estate is insolvent, yet if she were her husband's legal personal representative she could defeat the statutory provisions, and so obtain priority over the other creditors. The decision was considered recently in the House of Lords in the case of *Attorney-General v. Jackson* (4). In that case it was held that a legal personal representative's right of retainer could not be exercised so as to defeat debts which were given priority by the Bankruptcy Act, 1914. The particular debts considered in that case were those due to the Crown. It seems to me that there is no difference in principle between the case where a debt is given priority by the express terms of a statute and the case where the priority is given to a particular class of debts by the express postponement of that class to another class of debts. LORD ATKIN said in his speech at p. 374 :

In *Re Ambler* (1) the judges followed the dicta in *Re Leng* (3), though both FARWELL, J., and STIRLING, L.J., would have themselves decided otherwise. I do not think that there was any decision constraining the Court of Appeal to decide *Re Ambler* (1) as they did. It may be that the decision can be supported by reference to the more restricted rules as to the effect of the Bankruptcy Act governing the administration of estates under an order of the court before the Act of 1925. And it is possible that the position of debts covered by the Bankruptcy Act, s. 36, which, by subsect. 2, takes the place of the Married Women's Property Act, 1882, s. 3, may at some future time be held not to be in a lower degree than the debts to which they are postponed, though I cannot foresee the reason for so holding. But I am satisfied that, unless *Re Ambler* (1) can be distinguished in some such way, it should not be followed in this House so as to defeat what appears to me to be a very plain application of the well-established law relating to retainer. I am of opinion that to the extent to which the Crown's claim for taxes is given priority in bankruptcy it is a debt of higher degree than that of the executrix in this case and that she cannot exercise her right of retainer in priority to such claim.

LORD TOMLIN said at p. 385 :

The right to retain or to prefer has not been altered, but the degrees in which debts are ranged have been changed, and it is in the field as so changed that the

rights in question must to-day operate. The result is that all debts fall within one or other of two degrees. There are no other degrees where the Act of 1925 applies. If, therefore, a legal personal representative is a creditor for a debt in the higher of the two degrees he can retain against all creditors of whichever degree they may be. If, however, his debt falls within the lower degree, he can retain against all creditors of such degree, but against none in the higher degree.

It will be observed that LORD TOMLIN states that there are only two degrees in which debts are ranged. This is, of course, a general statement, and his mind was not directed in that case to the case of debts owing to a wife from her dead husband's insolvent estate in respect of loans made for the purpose of his business. These debts appear to me to form either a third degree or an exception to the second degree. Speaking of *Re Ambler* (1), LORD TOMLIN said at p. 385 :

It is, however, difficult to reconcile with the decision in *Re Ambler* (1). It is true that that case was decided upon different statutes, and at a time when the whole field of insolvency was not occupied by the bankruptcy rule of priorities of debts, and on these grounds some distinction may be founded. I am satisfied, however, that, whether distinguishable or not, it ought not to afford a guide to your Lordships' House in resolving the question now under consideration.

I am unable to appreciate any principle on which *Re Ambler* (1) can, for the purposes of the present case, be distinguished from the decision of the House of Lords, and in my judgment the principle of the latter decision must govern this case.

In the result I hold that on Feb. 8, 1935, the respondent had in her hands the sum of £432 10s. which forms part of her husband's estate, and that she had not made this sum her own by paying it into her private account, for she had no right of retainer in respect of her own debt as against the other debts due from the estate. Those other debts had, in fact, statutory priority over the debts due to her. I therefore order that the respondent pay to the Official Receiver the sum of £432 10s., and the respondent must pay the costs of the motion.

Solicitors : *Solicitor to the Board of Trade* (for the Official Receiver) ; *Sharpe, Pritchard & Co.*, agents for *Underhill, Neve, Thorneycroft, Taylor & Co.*, Wolverhampton (for the respondent).

[Reported by REGINALD TOWNSEND, ESQ., Barrister-at-Law.]

Re CLARK, SON & MORLAND, LTD.'S TRADE MARK.

[CHANCERY DIVISION (Clauson, J.), **July 10, 13, 14, 1936.**]

Trade Marks—Rectification of register—Geographical word—"Adapted to distinguish"—"Glastonburys"—Trade Marks Acts, 1905 to 1919, s. 9 (5).

The respondents, who traded in Glastonbury in articles made of sheepskin, registered the word "Glastonburys" as a trade mark. The applicants who dealt in similar goods in the same town applied to rectify the register of trade marks by expunging this mark on the grounds that it was a geographical mark and not adapted to distinguish the goods of the respondents and was calculated to lead to deception:—

HELD: (i) the addition of the letter "s" to Glastonbury did not alter its geographical character.

(ii) the evidence fell very far short of what is required to show that the mark was adapted to distinguish the goods of the respondents and the register should be rectified by the expunging of the mark.

[EDITORIAL NOTE.] The well-known difficulty of registering a geographical name is here attempted to be surmounted by the addition of an "s" to the name. This addition is here held not to alter the geographical nature of the word, and the mark was eventually defeated by an insufficiency of evidence to show that it was distinctive of the respondents' goods.

AS TO GEOGRAPHICAL NAMES AS TRADE MARKS, see **MALSBURY**, 1st Edn., Vol. 27, Trade Marks, p. 691, para 1257; and FOR CASES, see **DIGEST**, Vol. 43, pp. 146, 147, Nos. 72-78.]

Cases referred to:

- (1) *Re J. & P. Coats, Ltd.'s, Application*, [1936] 2 All E.R. 975.
- (2) *Eastman Photographic Materials Co. v. Comptroller-General of Patents, Designs & Trade Marks*, [1898] A.C. 571; 15 R.P.C. 476; 43 Digest 140, 32.
- (3) *Re California Fig Syrup Co.*, [1910] 1 Ch. 130; 26 R.P.C. 846; 43 Digest 143, 53.
- (4) *Re "Apollinaris" Trade Mark*, [1907] 2 Ch. 178; 24 R.P.C. 436; 43 Digest 154, 127.
- (5) *Re Liverpool Electric Cable Co., Ltd.'s Application* (1928), 46 R.P.C. 99; Digest Supp.
- (6) *Re Crosfield (J.) & Sons, Ltd.*, [1910] 1 Ch. 130; 43 Digest 153, 114.
- (7) *Re Gramophone Co.'s Application*, [1910] 2 Ch. 423; 27 R.P.C. 689.
- (8) *Re Woodward's Trade Mark, Woodward, Ltd. v. Boulton Macro, Ltd.* (1915), 85 L.J. Ch. 27; 32 R.P.C. 173; 43 Digest 192, 410.
- (9) *Imperial Tobacco Co. of Great Britain & Ireland, Ltd. v. De Pasquali & Co.*, [1918] 2 Ch. 207; 35 R.P.C. 185; 43 Digest 144, 61.
- (10) *Re Willys-Overland Co.'s Application* (1920), 37 R.P.C. 244; 43 Digest 152, 112.
- (11) *Banham (George) & Co. v. Reddaway (F.) & Co.*, [1927] A.C. 406; 43 Digest 183, 337.
- (12) *Re "Carvino" Trade Mark*, [1911] 2 Ch. 572; 29 R.P.C. 81; 43 Digest 302, 1263.

MOTION for rectification of the register of trade marks by expunging therefrom the word "Glastonburys." The applicants and their predecessors had carried on business in Glastonbury since 1867 and dealt

inter alia, with articles made of skeepskin. The respondents had carried on a similar business in Glastonbury since 1870. On July 30, 1924, they registered a mark containing the words "Glastonbury Motoring Over-shoes," and on June 29, 1927, and on Sept. 7, 1928, they registered marks containing the word "Glastonburys." These marks were registered with a disclaimer to the exclusive use of the word "Glastonburys." In 1933 the respondents obtained registration of the word "Glastonburys" without any limiting words, having produced to the registrar evidence of distinctiveness. The applicants applied to the court by motion under the Trade Marks Acts, 1905 to 1919, s. 35.

K. E. Shelley for the applicants.

Trevor Watson, K.C., and *Robert Burrell* for the respondents.

Shelley: If a mark consisting of a geographical name is of such a character that a substantial number of persons would inevitably think that it denoted the place where the goods were made, then such a mark is not registrable; that depends upon its inherent properties. If such a mark in fact denotes to a number of persons the place where the goods were made, it is also not registrable; that depends upon the evidence. Here the evidence shows that the mark denotes to many people either slippers made in Glastonbury, or slippers made by persons other than the respondents. In order to register a geographical word the registrar must be satisfied that it is capable of distinguishing the goods of the applicants. If a word is geographical, it is not adapted to distinguish: *Eastman Photographic Materials Co. v. Comptroller-General of Patents, Designs & Trade Marks* (2). It is not sufficient to show that the word does in fact mean to a large number of people the goods of the applicants: *Re California Fig Syrup Co.* (3). *Re "Apollinaris" Trade Mark* (4) is the only case where a geographical name was allowed which had a reference to the character of the goods; in that case the applicants owned the whole of the territory from which the mineral water was obtained. A geographical term is not necessarily unregistrable, but in this case Glastonbury is noted for this kind of goods, and it is not fair to allow one trader to monopolise it. [He also referred to *Re Liverpool Electric Cable Co., Ltd.'s Application* (5).]

Trevor Watson, K.C.: By reason of the Trade Marks Acts, 1905, to 1919, s. 40, the burden of proof is on the applicants to satisfy the court that the mark is not adapted to distinguish the goods of the respondents. The court may conclude that although a mark is in fact distinctive it is yet not adapted to distinguish, but this has never been done except in cases where there is something inherent in the mark itself which renders it not adapted to distinguish: *Re Crosfield (J.) & Sons, Ltd.* (6). Compare *Re J. & P. Coats, Ltd.'s Application* (1). "Glastonburys" is not a word inherently incapable of becoming distinctive. In its primary sense it is certainly geographical, but Glastonbury is just the

type of town that may become distinctive owing to the activity of a firm of traders. Once that is established, it becomes a question of the evidence of distinctiveness. This is quite different from *Re Liverpool Electric Cable Co., Ltd.'s Application* (5). One of the rights of a trade mark proprietor is to try and popularise a part of his mark. If he succeeds, that part then becomes a registrable trade mark. "Glastonburys" to the trade means the goods of the respondents; lack of evidence from members of the public is only relevant if the mark signifies to the public something different from what it does to the trade: *Re Gramophone Co.'s Application* (7). If the mark is in fact distinctive, there is no reason to remove it from the register, because it cannot honestly be used as a trade mark by anyone else without deception. [He also referred to *Re Woodward's Trade Mark, Woodward, Ltd. v. Boulton Macro, Ltd.* (8).]

Burrell: There are three tests to be applied by the court: Is the mark distinctive? Does it offend the provisions of ss. 11 or 19 of the Acts? Will s. 44 of the Acts adequately protect an honest trader? [He referred to *Re J. & P. Coats, Ltd.'s Application* (1); *Imperial Tobacco Co., Ltd. v. De Pasquali & Co.* (9); *Re Willys-Overland Co.'s Application* (10).] It is not material that the word still indicates a geographical origin provided that it now means the goods of the respondents. [He also referred to *Banham (George) & Co. v. Reddaway (F.) & Co.* (11); and *Re "Carvino" Trade Mark* (12).]

CLAUSON, J.: This is a motion for an order that the register of trade marks may be rectified by expunging therefrom a mark consisting of the word "Glastonburys," the name of the town of Glastonbury with an "s" at the end of it, the applicants who ask for the mark to be expunged being the firm of Baily & Co., Ltd, who carry on business at Glastonbury, the owners of the registered trade mark being a firm of Clark, Son & Morland, Ltd., who also carry on business at Glastonbury.

The facts are these. These two firms at Glastonbury carry on businesses some portion of which in each case consists of dealing with lambskins and sheepskins with the wool attached and selling articles made in that way. The particular articles with which I have to deal are slippers made of lambskin or sheepskin framed, I think, with the wool inside the slipper, and it is in respect of slippers that the mark is registered. The applicants' predecessors were established in Glastonbury in the year 1867, and they, and the present limited company which succeeded to their business in 1909, have carried on business of the nature I have described in Glastonbury since 1867. It appears that from 1867 for some fifteen years the applicants in fact made slippers of the kind I have described, but they seem to have turned their attention to other matters and did not put on the market slippers of this character again until the

year 1928. The respondent firm seems to have been founded more than a century ago, and they have been carrying on business in Glastonbury since the year 1870. They also at some period of their career became a limited company, but that is immaterial to the question with which I have to deal. Somewhere about the year 1920 the respondents began to sell slippers such as I have described, the applicants having given up the selling of such slippers some thirty years before. It appears that in the first instance the respondents did not themselves put the slippers on the market, but sold them to a cognate firm with which their directors were connected at Street, which is just outside Glastonbury. In 1924 they appear to have been selling slippers on their own account, and in 1924 they registered a mark, not for slippers, but for motoring overshoes, apparently, which shows two arches which obviously has some kind of reference to the well known Abbey ruins at Glastonbury, and has the words "Glastonbury Motoring Overshoes." That trade mark was registered on the footing that the registration of it was to give no right to the exclusive use of the word "Glastonbury." In 1926 they registered a similar trade mark, but without the words "Glastonbury Motoring Overshoes," and in 1927 they registered a trade mark with similar arches, and over the top of the arches the word "Glastonburys" in very plain print upon a black ground. In 1931 they appear to have begun using the word "Glastonburys," spelt as on their trade mark, the name of the town with an "s" after it, and appear to have begun using it as the term applied to their slippers. In 1933 they obtained registration of the mark against which complaint is now being made, "Glastonburys," in plain type, the name of the town with an "s" appended at the end of it, and that was registered without any such limiting words as had been used before, the applicants alleging distinctiveness.

The registration of that mark seems to have come prominently to the attention of the applicants in this way. Just about the same time as this mark was registered the respondents brought an action against a firm who had purchased some slippers from the applicants, and one of the complaints—there were many complaints—was an advertisement which had described the applicants' slippers as "Glastonbury made." In those circumstances it is not astonishing that the applicants regard themselves as persons aggrieved. It was practically admitted by counsel for the respondents that it was not possible for him to contend that they were not, in the circumstances, persons aggrieved by the registration, and they accordingly come to this court and ask that the trade mark in question should be expunged.

The question that I have to decide is this. There is no doubt whatever that "Glastonbury" is a geographical name, and in my view the addition of the letter "s" to it leaves its character as a geographical name unaltered; therefore *prima facie* it is a word which cannot be registered

as a trade mark under either of the first four paragraphs of sect. 9 ; but para. (5) provides this :

"Any other distinctive mark, but a name, signature, or word or words, other than such as fall within the descriptions in the above paragraphs . . . shall not be registrable under the provisions of this paragraph, except upon evidence of its distinctiveness.

As I indicated, when the respondents obtained registration of this trade mark, they alleged to the registrar distinctiveness, and no doubt there was some evidence before him of distinctiveness, or the mark would not have appeared upon the register. The section continues :

For the purposes of this section "distinctive" shall mean adapted to distinguish the goods of the proprietor of the trade mark from those of other persons. In determining whether a trade mark is so adapted, the tribunal may, in the case of a trade mark in actual use, take into consideration the extent to which such user has rendered such trade mark in fact distinctive for the goods with respect to which it is registered or proposed to be registered.

A large amount of evidence has been put in on the one side and the other, bearing upon the question as to the extent to which user by the respondents of the word "Glastonburys" has rendered that word in fact distinctive for slippers of the character that I have mentioned. The evidence does show, as one would expect from what I have said as to the way in which the word has been used and from the fact that the respondents have advertised it extensively and have apparently sold a very large number of slippers upon advertisements or with reference to literature and brands in which the word "Glastonburys" appears, that a considerable number of people, when they see the word "Glastonburys," think at once of it as indicating the manufacture of the respondents ; in particular, persons who have been in trade relations with the respondents. The evidence to that effect has come mainly from that last class of persons, though it also contains statements, which I dare say no doubt are substantially true, that a certain number of customers of the retailers who have bought from the respondents have got used to their name and regard the name as indicating the respondents' goods. On the other hand, I have a considerable amount of evidence to show that there are large classes of persons in the trade, or connected with the trade in this sense, general stores and so forth, are actually asked for slippers and supply slippers, who know nothing about the use of the word "Glastonburys" and who know nothing about the respondents or that user. That there has been a considerable user of the word I do not doubt, but in my view the evidence falls very far short of what is required to show that the word in question is in fact distinctive of the goods ; it is distinctive to some extent, but far from generally distinctive, in my view. I have expressed that view as to the evidence.

The problem that I have to consider is this : Is this mark a mark adapted to distinguish the goods of the respondents from those of other persons ? In my view it is quite impossible for me to hold that it is. It appears to me that it is adapted rather to occasion confusion between the goods of the respondents and similar goods manufactured by another firm, long established in Glastonbury, who in fact are selling these goods. It is suggested that the applicants are perfectly free to sell their goods as made in Glastonbury, even if the trade mark is registered, and reference is made to sect. 44 of the Act. The suggestion does not come with very great force from the respondents who themselves, wisely or unwisely, immediately after the registration of their mark did seek to complain against an advertisement which spoke of slippers, which were in fact the applicants' slippers, as being "Glastonbury made." However that may be, the position appears to be clear on the authorities. I do not propose to refer to them ; they are very well known. My attention has been drawn to the quite recent case of *Re Coats* (1) in the Court of Appeal, where the previous authorities were stated in a very convenient form, though, if I may say so, I do not think the decision of the Court of Appeal in the more recent case has in any way extended the law ; but one thing that I am entitled to do, and indeed bound, as I read the authorities, to do, is to look at sect. 44 as a useful guide. I should do well, as I gather from the authorities, to ask myself the question : Will the registration of the trade mark cause substantial difficulty or confusion with the rights of user by other traders ; that is, the rights of user referred to in sect. 44 ? In my view, the answer to that question is that the registration of this mark would cause substantial difficulty or confusion.

With that guide before me, and taking the view that I do as to the evidence, it appears to me to be impossible for me to take any other course than to order the rectification of the register in the way asked in the application, and accordingly the order will be made in the terms of the notice of motion, and the respondents will pay the costs.

Solicitors : *Woodham Smith & Borradaile* (for the applicants) ; *Bridges, Sawtell & Co.*, agents for *Gould & Swayne*, Glastonbury (for the respondents).

[Reported by E. FULLER BRISCOE, Esq., Barrister-at-Law.]

FERRIER v. SCOTTISH MILK MARKETING BOARD.

[HOUSE OF LORDS (Lord Blanesburgh, Lord Atkin, Lord Thankerton, Lord Macmillan and Lord Maugham), **May 15, 18, July 16, 1936.**]

Agricultural Marketing—Milk marketing—Costs of operating milk marketing scheme—Method of computing contributions payable by milk producers—Whether costs include loss from sale of surplus milk—Agricultural Marketing Act, 1931 (c. 42), s. 1 (8)—Scottish Milk Marketing Scheme (Approval) Order, 1933, s. 24 (2).

The appellant was liable as a registered producer and retailer of milk to contribute to the costs of operating the scheme contained in the Scottish Milk Marketing Scheme (Approval) Order, 1933, made under and in terms of the Agricultural Marketing Act, 1931, s. 1 (8), and administered by the respondents. Under the scheme, which came into operation on Dec. 1, 1933, the respondents fixed a price for the sale of milk and realised the unmarketable surplus of milk by selling it in a cheaper market. In computing the costs of operating the scheme the respondents included as a cost of operation the difference between the lower price received by them for the surplus milk and the price in the liquid market, upon which basis the respondents sought to recover rateably from all registered members of the scheme, including the appellant, a charge or levy calculated at so much per gallon of milk disposed of by each member. The appellant, when called upon to pay this charge or levy for each of the months of Dec., 1933, to July, 1934, inclusive, declined to do so, and, without disputing the arithmetical correctness of the sum claimed, contended that the respondents had wrongly and illegally included in their computation of costs the amount of the alleged loss relating to the said sale of surplus milk, and that, as their method of computation and disposal of contributions provided a benefit to ordinary producers to the detriment of producers and retailers, they had acted *ultra vires* and contrary to the provisions of the scheme.

The respondents' basis of computation was in accordance with a previous decision of the Second Division of the Court of Session in a recent special case to which the appellant was not a party:—

HELD: the difference between the lower price received by the respondents and the price in the liquid market was not a "cost" of operating the scheme; and the contributions claimed from the appellant being unauthorised by the scheme, the respondents had acted *ultra vires* in respect that the disposal of the said contributions conferred a benefit upon the class of ordinary producers at the expense of the class of producers and retailers including the appellant.

Judgment of the First Division of the Court of Session reversed.

[EDITORIAL NOTE.] The point raised here is one of the construction of the particular scheme, but is a very vital one in respect of that scheme, and would seem to be of some assistance in considering the operating costs of similar schemes.

FOR THE AGRICULTURAL MARKETING ACT, 1931, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 24, p. 11; and FOR CASES, see DIGEST Supp., Food and Drugs, Nos. 476 (g)-(i).]

Cases referred to:

- (1) *Scottish Milk Marketing Board v. Barron* (1934), July 20, unreported.
- (2) *Gillespie v. Russel, Russel v. Gillespie* (1859), 3 Macq. 757; 21 Digest 210, Case (a).
- (3) *McKinlay or Waterson v. Henry Murray & Co.* (1884), 11 R. (Ct. of Sess.) 1036.
- (4) *Levene v. Inland Revenue Comrs.*, [1928] A.C. 217; Digest Supp.

APPEAL from an Interlocutor of the First Division of the Court of Session giving judgment for the sum claimed in favour of the respondents.

The history of the proceedings, the facts, and the arguments are fully set out in the judgments.

Arthur P. Duffes, K.C., and *J. G. McIntyre* for the appellant.

J. S. C. Reid, K.C., and *J. L. Clyde* for the respondents.

LORD BLANESBURGH : My Lords, I have had the privilege of reading the opinion which has been prepared by my noble and learned friend, LORD THANKERTON, and which he is about to pronounce. I agree entirely with the conclusion at which my noble and learned friend has arrived and with the reasons which he gives in support of it.

LORD ATKIN [read by LORD THANKERTON] : My Lords, I have had the advantage of reading the opinion about to be delivered by my noble and learned friend LORD THANKERTON with which I agree : and only add a few words of my own to state an additional reason for the conclusion to allow the appeal at which I believe all your Lordships have arrived. The fallacy as I venture to think it in the reasoning of the majority of the learned judges in *Barron's* case (1) is not unfamiliar. They have found in the Act and scheme a central purpose, equality of price between milk producers, and have adapted their construction of the words of the scheme to carry out this object. My Lords, this procrustean method has the almost inevitable result of stretching the meaning of words to fit the bed so constructed. For my part I share the doubt expressed by the late LORD MURRAY, whose loss to judicature lawyers both in England and Scotland deplore, as to whether either the Act or the scheme aimed at equality between all producers. There appear to be excellent reasons why at any rate some of the two classes of produce retailers and producers of certified milk might claim that they control their own market and are in no way dependent upon or assisted by the existence of a milk marketing board. But leaving this aside the question always must be what do the relevant words mean. I cannot bring myself to think that the words "to recover a contribution necessary to cover the costs of operating the scheme" include a contribution for the purpose admitted in the fourth condescendence and answer in the present case. "Costs of operating the scheme" in ordinary language must mean expenditure or liability which if not recouped would fall upon the board : they cannot include in my opinion sums which represent no expenditure or liability of anyone but which are levied upon all milk producers for the sole purpose of increasing a fund to be distributed amongst some of the producers. They are not costs of obtaining a fund but levies to increase the fund. I find myself in agreement with the judgment of the late LORD MURRAY on this point. I adopt the motion suggested by my noble and learned friend.

LORD THANKERTON: My Lords, in the present action the respondents, who are the board administering the Scottish Milk Marketing Scheme, seek to recover a sum of £292 4s. 10d. from the appellant, as the contributions alleged to be due by him, as a registered producer under the scheme, in respect of the months from December, 1933, to July, 1934, inclusive. The appellant disputes his liability on the ground that the contributions so claimed include an element which is illegal and *ultra vires* of the respondents.

The Scottish Milk Marketing Scheme was constituted in 1933 under the Agricultural Marketing Act, 1931, and came into operation on May 26, 1933. The regulated product is milk produced within the area of the scheme, and registered producers under the scheme fall into two classes: (1) producers, who may conveniently be called ordinary producers, the proceeds of the sale of whose milk are required to be paid into the fund administered by the board; and (2) producer-retailers, producer-wholesalers and producers of certified milk, the proceeds of the sale of whose milk are not required to be paid into the fund. The appellant is a producer-retailer.

There are two main outlets for the sale of milk: the primary or liquid market, in which milk is sold for consumption, and which is little affected by foreign competition, and the secondary or manufacturing market, in which milk is sold for manufacture into cheese, butter, condensed milk, etc., and in which there is strong foreign competition. The quantity of milk produced in Scotland is far in excess of the demand from the primary market. The milk produced by the ordinary producers is sold under the directions of the board, whether in the liquid or the manufacturing market, and the proceeds of these sales are paid to the board and credited to the fund. The milk produced by the second class of registered producers, which includes the appellant, is practically all sold in the liquid market by the producers to their own customers, and the proceeds of such sales are retained by the producers; any surplus production by them will be sold subject to the directions of the board, and the proceeds of such sales will be paid to the board. There is no question of any such surplus in the case of the appellant, and, while such cases may occur, I find it unnecessary to take them into account for the purposes of the present question.

The proceeds of sales thus paid to the board may be said to form a pool, the free proceeds of which, after certain deductions, are divided among the ordinary producers, according to the number of gallons of milk thus sold by each producer and irrespective of whether the particular producer's milk in fact has been sold for liquid or manufacturing purposes.

The board fixes the minimum standard prices for both markets, which apply to all registered producers, and, generally speaking, it is clear that the operations of the board, among other things, tend to restrict

competition in the liquid market and to maintain a better level in prices in that market. The appellant, who is able to dispose of all his milk in the liquid market among his own customers, retains the proceeds free from the pooling effects of the board's administration of the fund.

The respondents seek recovery of the sum sued for in terms of sect. 24 (2) of the scheme, which provides as follows :

Contributions by registered producers to the Fund.—The board shall retain from the proceeds of the sale of the regulated product which are required to be paid into the fund, and shall recover from registered producers the proceeds of the sale of whose supplies of the regulated product are not required to be paid into the fund, such contribution as the board may from time to time consider necessary to cover the costs of operating the scheme and any sums which may be expended by the board under the powers conferred on them by subsect. (3) (b) of this section. The contribution shall be assessed as an amount per gallon on all the regulated product sold by registered producers, and, subject to the provisions of sect. 25 (2) (a) and the corresponding provisions of sects. 26 and 27 hereof, every registered producer shall be required to contribute the same amount per gallon.

Sect. 24 (3) (b) authorises expenditure by the board for the encouragement of agricultural co-operation, research and education. Sect. 25 (2) (a), which applies to producer-retailers, and the corresponding provisions of sects. 26 and 27, which apply to producer-wholesalers and producers of certified milk respectively, provide that such producers shall pay into the fund a contribution per gallon equal in amount to nine-tenths of that provided in sect. 24 (2), and that such contribution, unless otherwise determined by the board, shall be payable monthly and shall be a debt due by them to the board, which shall be recoverable by the board accordingly.

The only question now at issue between the parties is raised by answer (iv) of the condescendence in the following passage :

The defender believes and avers that in computing the amount of the said contributions the pursuers have illegally included items which are not part of the costs of operating the scheme within the meaning of the said sect. 24 (2). In particular, the defender believes and avers that the pursuers, in making the said computation, have in each month purported to include as a cost of operating the scheme large sums representing the difference between the actual price received by them for milk disposed of by them in the manufacturing market and the price which, as the pursuers pretend, would have been received by them if the said milk had been disposed of in the liquid market. In each of the said months the selling price in the liquid market (which was fixed by the pursuers) exceeded the price in the manufacturing market. The sums representing the said difference are not costs of operating the scheme within the meaning of sect. 24 (2), and the pursuers, in including the said sums in assessing the said contributions, have acted illegally and *ultra vires*. The defender is not bound to pay a share of the said contribution as so computed.

In answer to this averment, the pursuers state :

Explained that the selling price each month in the liquid market was only secured

by the pursuers diverting a proportion of the milk produced in the area of the scheme to the secondary market, where a lower price was obtainable, and the cost to the pursuers of this diversion was necessarily a cost of operating the said scheme.

My Lords, it is necessary to examine the meaning and effect of the portion of the contributions thus challenged by the appellant. In my opinion, this is made clear by the admissions of the respondents quoted above.

It is provided by sect. 24 (2) that, subject to the adjustment as to nine-tenths, in the case of the second class of producers, every registered producer shall be required to contribute the same amount per gallon. Accordingly, subject to the adjustment as to nine-tenths, the ordinary producers are equally liable with the second class for the contribution in question; but (as will appear from subsect. (3) (e) cited below) the produce of the contribution from both classes will go to benefit only the ordinary producers, who will thus not only get the return of their own contributions, but will also have divided among them the contributions from the second class, who will get nothing back. In short, the contributions levied from the second class will form compensation to the ordinary producers for the greater diversion of their milk into the manufacturing market in order to keep up the level of prices in the liquid market. In other words, by this means the board are *pro tanto* extending the averaging of the proceeds of sales in the two markets so as to affect the second class of producers.

My Lords, I have come to the conclusion that the contribution challenged by the appellant is not authorised by the scheme, and is beyond the powers of the board. In the first place, to collect a contribution, subject to the adjustment as to nine-tenths, at the same amount per gallon, and thereafter to return to a limited number of the contributories the amount of their contributions, does not, in my opinion, comply with the express provisions of sect. 24 (2) of the scheme. In the second place, I am of opinion the board are not entitled to extend the averaging of sale prices in the two markets so as to affect the second class of producers. Their only power of averaging sale prices in the two markets is conferred by sect. 24 (3) (e), which provides as follows :

As soon as practicable after the end of each calendar month, the board shall distribute any money standing to the credit of the fund which is in the opinion of the board not required for the operation of the scheme amongst registered producers, the proceeds of the sale of whose milk are required to be paid into the fund, in proportion to the quantity of milk sold by them to, or through the agency of the board, so that, with the exception of the payments referred to in the last two preceding paragraphs, every such registered producer, notwithstanding the price at which his milk may have been disposed of, shall be paid at a uniform rate on the basis of an average price. Provided that the board shall add to or deduct from the average price the amount, if any, by which the cost incurred in the haulage

of the milk from the farm or premises where it is produced to the point of delivery as instructed by the board, exceeds or is less, than the standard haulage rate, as defined in sect. 51 hereof. Provided, however, that any registered producer whose milk is of lower standard of quality than that specified by the board from time to time for milk, other than officially graded milk, may be required by the board, in respect of such milk, to accept such price, lower than the average price, as the board may determine.

Not only are the terms of that provision inapplicable to the second class of producers, but the latter are expressly exempted from the operation of that paragraph, and of the two preceding paragraphs by sects. 25 (1), 26 (1) and 27 (1). In my opinion, the contribution under challenge *pro tanto* extends the averaging of prices so as to affect the sale prices received by the second class, and constitutes a breach of that exemption, and is an unauthorised operation of the scheme. This renders it unnecessary to consider the arguments as to the meaning of the word "cost," for, however wide or artificial, in relation to its context, that meaning may be, it cannot include the cost of an operation of the scheme which is not permitted by the statutory scheme.

The grounds on which I have formed my conclusions do not appear to have been considered by the courts below in the present case, or in the previous special case in 1934, to which the present appellant was not a party. The discussion in the judgments appears to have been confined to the meaning of the word "cost."

I am therefore of opinion that the respondents have included among the elements which constitute the *cumulo* amount of the contributions sued for an element which they are not entitled to require from the appellant and which, in the present record, is not separable from the legitimate elements. In these circumstances, I am of opinion that the respondents' averments are irrelevant and insufficient to support the conclusions of the summons as laid, and that the appellant is entitled to be assoilzied from the conclusions of the summons as laid. This will not prevent the respondents, if they find it necessary, from bringing a fresh action for recovery of the legitimate elements in the contributions sought to be recovered: *Gillespie v. Russel*, (2); *McKinlay or Waterson v. Henry Murray & Co.* (3).

Accordingly, I am of opinion that the appeal should be allowed, that the interlocutor of the sheriff-substitute, dated Feb. 7, 1935, and the interlocutor of the First Division of the Court of Session, dated May 30, 1935, should be recalled, and that the defender should be assoilzied from the conclusions of the summons as laid. The appellant should get the costs of this appeal, and his expenses in the courts below.

LORD MACMILLAN [read by LORD MAUGHAM]: My Lords, The only provision of the Scottish Milk Marketing Scheme on which the respondents

can rely as empowering them to make any levy on the appellant is to be found in sect. 24 (2). They are thereby authorised to recover from the appellant such contribution as they may from time to time consider necessary "to cover the cost of operating the scheme," such contribution to be assessed in the prescribed manner. It is maintained by the respondents that these words entitle them to exact from the appellant a contribution towards making up the difference between the price obtained by the respondents for milk sold by them in the manufacturing market and the price which would have been obtained for it in the liquid market, or in other words to exact what may be described as a compensatory levy from the appellant.

If this was the intention of the framers of the scheme I cannot conceive of a less straightforward way of expressing it. No doubt it is possible to disengage from the complexities which under the scheme beset those who deal in what used to be called milk but which we must now call "the regulated product," a general conception of equalising the price ultimately to be obtained by all who have milk to sell, but imposts upon the subject cannot be imposed by inference. It is a sound and well-recognised principle that :—

a taxing statute must impose a charge in clear terms or fail, since it is to be construed *contra proferentem*.

(*Levene v. Inland Revenue Commissioners* (4), per VISCOUNT SUMNER at p. 228). The levy which the respondents seek to impose upon the appellant is none the less a tax because it is part of a scheme intended for his economic benefit.

The critical words in the present case—"the costs of operating the scheme"—are in my opinion quite inapt to cover the compensatory levy which the appellant challenges. That the respondents obtain a lower price for milk sold for manufacturing purposes than is obtained for milk sold in the liquid market is doubtless the case. But this is an incident of the scheme, not a "cost" of operating it. They have not incurred any "cost" by selling milk in the manufacturing market. There has been no disbursement on their part. At most it can only be said that they have received a less return for the milk of which they have so disposed than they would have received if they had disposed of it in the liquid market. But I cannot find any justification, least of all in what is in effect a taxing statute, for construing the words "the costs of operating the scheme" as including this difference of price.

My noble and learned friend LORD THANKERTON has disclosed other and formidable difficulties in the way of the respondents, but for myself I am content to say that the words of sect. 24 (2) do not, in my opinion,

warrant their contention. I accordingly concur in the motion that the appeal should be allowed.

LORD MAUGHAM: My Lords, I have had an opportunity of considering the opinion which my noble and learned friend LORD THANKERTON has delivered. I entirely agree with it and will only add that I also agree with the view my noble and learned friend, LORD MACMILLAN, has expressed as to the meaning of the words "the cost of operating the scheme." I therefore concur in the motion that the appeal should be allowed.

Appeal allowed with costs.

Solicitors: *Ince, Roscoe, Wilson & Glover*, agents for *J. Sinclair Lawrie*, Edinburgh (for the appellant); *Ellis & Fairbairn*, agents for *Ketchen & Stevens*, W.S. Edinburgh (for the respondents).

[Reported by MICHAEL MARCUS, Esq., Barrister-at-Law.]

SODEMAN v. R.

[PRIVY COUNCIL (Viscount Hailsham, L.C., Lord Macmillan and Sir Isaac Isaacs), **May 28, 1936.**]

Criminal Law—Murder—Insanity—Accused aware that act was wrong—Irresistible impulse—Burden of proof.

The petitioner, who was a labourer, took a young girl for a ride on his bicycle, strangled her, tied her hands behind her back, stuffed some of her clothing into her mouth, and left her for dead. The cause of death was suffocation. The petitioner had committed three previous murders in very similar ways. The petitioner's defence was that he was insane at the time. At the trial two government prison doctors and a specialist in mental diseases gave evidence in support of that defence. No expert evidence on that issue was tendered by the Crown:—

HELD: (i) the law with regard to insanity was stated in *M'Naghten's* case (1), and there was not to be added to that statement another rule that where a man knew that he was doing wrong, but was forced to do the act by an irresistible impulse produced by disease, he could rely upon a defence of insanity.

(ii) the burden in cases in which an accused had to prove insanity might fairly be stated as not being higher than the burden which rested upon a plaintiff or defendant in civil proceedings.

[EDITORIAL NOTE. This case raises the question whether the rules in *M'Naghten's* case (1) are quite consistent with modern medical theory. The Privy Council refused to depart from the rules there laid down.

AS TO THE RULE IN *M'NAGHTEN'S* CASE, see HALSBURY, Hailsham Edn., Vol. 9, pp. 20-22, paras. 14-17; and FOR CASES, see DIGEST, Vol. 14, pp. 55-63, Nos. 218-288.]

Cases referred to:

- (1) *M'Naghten's Case* (1843), 10 Cl. & Fin. 200; 14 Digest 56, 229.
- (2) *R. v. Flavell* (1926), 19 Cr. App. Rep. 141; Digest Supp.
- (3) *R. v. Kopsch* (1925), 19 Cr. App. Rep. 50; Digest Supp.

- (4) *R. v. Clark* (1921), 61 S.C.R. 608; 14 Digest 60, Case (g).
- (5) *R. v. Davis* (1881), 14 Cox, C.C. 563; 14 Digest 64, 293.
- (6) *R. v. Hay* (1899), 16 S.C. 290 (S. Africa); 14 Digest 58, 245 (i).
- (7) *R. v. Smith* (1910), 6 Cr. App. Rep. 19; 14 Digest 60, 256.
- (8) *R. v. Hay* (1911), 75 J.P. 480; 14 Digest 58, 236.
- (9) *R. v. Fryer* (1915), 24 Cox, C.C. 403; 14 Digest 58, 237.
- (10) *R. v. True* (1922), 127 L.T. 561; 14 Digest 58, 239.
- (11) *Woolmington v. Public Prosecutions Director*, [1935] A.C. 462; Digest Supp.

PETITION by Arnold Karl Sodeman for special leave to appeal from (a) his conviction before GAVAN DUFFY, C.J., and a jury on Feb. 18, 1936, of the murder of Jane Rushmer, aged six and a half years; (b) the dismissal of his appeal by the full court of the Supreme Court of the State of Victoria; and (c) the order of the High Court of Australia dismissing his application for special leave to appeal to the High Court of Australia. On conviction Sodeman was sentenced to death. The petitioner was a labourer. He took a young girl for a ride on his bicycle, strangled her, tied her hands behind her back, stuffed some of her clothing into her mouth, and left her for dead. The cause of death was suffocation. His defence was that he was insane at the time of the killing. At the trial two government prison doctors and a specialist in mental diseases gave evidence in support of that defence. No expert evidence on that issue was tendered by the prosecution.

D. N. Pritt, K.C. and *Wilfrid Barton* for the petitioner: The trial judge's direction to the jury was defective and misleading in that it did not bring before the jury the true nature of the defence, but, on the contrary, was likely to lead the jury to suppose that delusional insanity was the only kind of insanity which afforded a defence to a criminal charge. The petitioner, it was said, had no delusions, but had a mind which could not resist doing what he did. The trial judge directed the jury solely on the rules laid down in *M'Naghten's* case (1), whereas there is a body of judicial expressions of opinion in criminal litigation in England and in other parts of the Empire which go to show that at this moment the law of all British jurisdictions is that the rules in *M'Naghten's* case (1) are not the whole of the matter. The authorities said that a man might know that a thing is wrong and yet by impulse or obsession act in such a way that he ought to be acquitted, or found guilty but insane. The rules in *M'Naghten's* case (1) are no longer the whole of the law of England on that matter. The judge also misdirected the jury as to the nature of the burden of proof resting upon an accused person, who sets up the defence of insanity, in that he directed them that the burden of proof of insanity which lay upon the prisoner was as strict and onerous as the burden of proof which lay upon the Crown with regard to the facts which the prosecution has to establish. The burden of proof on the accused was only the same as that on a plaintiff or defendant in a civil case. The evidence that the petitioner had previously killed in

very similar circumstances three young girls other than Jane Rushmer was wrongly admitted.

[Counsel referred to the cases set out above and to STEPHEN'S DIGEST OF CRIMINAL LAW, 7th edn., art. 38.]

G. B. McClure for the Crown.

The judgment of their Lordships was delivered by VISCOUNT HAILSHAM, L.C.

VISCOUNT HAILSHAM, L.C. : There are two principal grounds in the petition for special leave to appeal. First, it is suggested by the petitioner that the rules in *M'Naghten's* case (1) are no longer to be treated as an exhaustive statement of the law with regard to insanity, and that there is to be engrafted upon those rules another rule that where a man knows that he is doing what is wrong, none the less he may be held to be insane if he is caused to do the act by an irresistible impulse produced by disease. It is admitted by Mr. Pritt that, so far as this country is concerned, the more recent cases, finishing with *R. v. Flavell* (2), excludes that addition to the law in *M'Naghten's* case (1), but it is argued that, since there have been earlier decisions which suggest that such a rule exists, this is a good opportunity for establishing the law beyond doubt. Their Lordships do not think that the argument is a sound one. If they are to take a different view of the law from that which prevailed in *R. v. Flavell* (2) and *R. v. Kopsch* (3) the effect will be that different standards of law will prevail in England and in the Dominions. The adoption of such a view obviously cannot alter the authorities laid down by the English Court of Criminal Appeal, and their Lordships do not think that the ground suggested is one for granting special leave to appeal in a criminal case. The other point is that the trial judge in directing the jury as to the burden of proof, having stated that it was for the Crown to establish its case beyond reasonable doubt, went on to say that the burden of proof in a case of insanity rested upon the accused, and the suggestion made by the petitioner was that the jury may have been misled by the judge's language into the impression that the burden of proof resting upon an accused to prove insanity is as heavy as the burden of proof resting upon the prosecution to prove the facts which they have to establish. In fact there is no doubt that the burden of proof for the defence is not so onerous. It has not been very definitely defined. The Canadian case of *R. v. Clark* (4) was referred to, but even there the judges were not able to find a very satisfactory definition, but it is certainly plain that the burden in cases in which an accused has to prove insanity may fairly be stated as not being higher than the burden which rests upon a plaintiff or defendant in civil proceedings. That this is the law is not challenged, and no court in Australia has decided otherwise. The only question is whether the distinction was sufficiently brought home to the minds of the jury by the language used in the summing up. On that

point the Supreme Court of Victoria took the view, unanimously, that there was no misdirection, and in the High Court of Australia the opinion of the judges was divided, but the opinion which prevailed was, again, that there was no misdirection. Their Lordships do not think that that question whether or not the language used was enough clearly to bring the matter home to the jury in the particular case—it is not a question of general legal importance, but only a question of the exact turn of the phrase—can, except in a very clear case, be a ground for exercising the very exceptional jurisdiction which is reserved to the Board in criminal cases. We are satisfied that there was no doubt in the minds of any of the courts below as to what the law really is, and we are quite satisfied to accept the view of the courts below that the language used was not such as would be misunderstood by the jury, or as would be capable of misleading the jury as to the onus. In these circumstances it seems to their Lordships that the standard which is required for the granting of leave to appeal in a criminal case, which has been repeatedly laid down in a series of well-known authorities, has not been reached in this case, and their Lordships will therefore humbly advise His Majesty to dismiss the petition.

Solicitors: *Galbraith & Best* (for the petitioner); *Freshfields, Leese & Munns* (for the respondent).

[Reported by T. A. DILLON, Esq., Barrister-at-Law.]

THE COUNTY VALUATION COMMITTEE FOR THE COUNTY OF MIDDLESEX v. THE ASSESSMENT COMMITTEE FOR THE WEST MIDDLESEX ASSESSMENT AREA.

[CHANCERY DIVISION (Farwell, J.), July 14, 16, 1936.]

Rates and Rating—Assessment committee meetings—Right of exclusion—County valuation committee officer—Rating and Valuation Act, 1925 (c. 90), ss. 17, 18.

The county valuation committee for the County of Middlesex directed their county valuation officer or some responsible person representing him, to attend the meetings of the assessment committee for the West Middlesex Assessment Area for the purposes of informing himself of what took place at those meetings, tendering information or advice and otherwise taking part in the proceedings. The assessment committee objected to the attendance of any such person and claimed the right to exclude him. Both bodies are constituted by the Rating and Valuation Act, 1925, which regulates their duties and obligations:—

HELD: upon a proper construction of the Rating and Valuation Act, 1925, the valuation committee have a right to send their valuation officer or other responsible person to attend the meetings of the assessment committee, but the valuation officer cannot be made a member of the assessment committee and cannot, therefore, participate in the decisions of that committee. The valuation committee and their officer must conform with all requirements contained in the Act with regard to notices where it is desired to oppose or otherwise take part in any proceedings before the committee.

[EDITORIAL NOTE.] The work of the county valuation committee is difficult in that it is important that assessments throughout the county should be uniform as far as possible. It is therefore desirable that it should, by its officer, be present at the meetings of assessment committees, so that it can be kept properly informed of the details and basis of its valuations.

AS TO COUNTY VALUATION COMMITTEES, see HALSBURY, 1st Edn., Supp. to Vol. 24, Rates and Rating, paras. 86, 87; and FOR THE RATING AND VALUATION ACT, 1925, s. 18, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 14, pp. 642-644.]

Cases referred to :

- (1) *R. v. Surrey County Assessment Committee, North-Eastern Assessment Area, Ex p. Woolworth & Co.*, [1933] 1 K.B. 776; Digest Supp.
- (2) *Coulsdon & Purley U.D.C. v. Surrey County Council*, [1934] 1 Ch. 694; Digest Supp.
- (3) *Tenby Corpn. v. Mason*, [1908] 1 Ch. 457; 33 Digest 61, 370.
- (4) *Purcell v. Sowler* (1877), 2 C.P.D. 215; 32 Digest 146, 1764.
- (5) *Pittard v. Oliver*, [1891] 1 Q.B. 474; 32 Digest 118, 1496.
- (6) *Ladies' Hosiery & Underwear, Ltd. v. West Middlesex Assessment Committee*, [1932] 2 K.B. 679; Digest Supp.

MOTION for an interlocutory injunction in an action between the County Valuation Committee for the County of Middlesex and the Assessment Committee for the West Middlesex Assessment Area. By their writ in the action the plaintiffs claimed :

(i) A declaration that the plaintiffs by their county valuation officer or other their duly authorised representative are entitled to attend meetings of the defendants during the hearing of all objections to draft valuation lists and all proposals to amend current valuation lists.

(ii) An injunction to restrain the defendants, their servants or agents from excluding the plaintiffs' county valuation officer or other their duly authorised representative from their meetings during the hearing by the defendants of any objections to draft valuation lists or of any proposals to amend current valuation lists.

And by their notice of motion in the present proceedings, which the parties subsequently agreed to treat as the trial of the action, the plaintiffs asked that the defendants, their servants or agents might be restrained by the order and injunction of this Honourable Court from excluding the plaintiffs' county valuation officer or other their duly authorised representative from their meetings during the hearing by the defendants of any objections to draft valuation lists or of any proposals to amend current valuation lists until judgment in the action or until further order.

Both the plaintiff and the defendant committees were set up under the provisions of the Rating and Valuation Act, 1925, the former under sect. 17 and the latter under sect. 18, and the plaintiffs maintained that in order to discharge the duties cast upon them by the Act it was necessary that their representative should be allowed to attend the meetings of the defendants on the occasions stated in their writ. The

defendants objected that the only occasions on which such representative was entitled to be present at their meetings were :

(i) When the county valuation committee themselves were making an objection or proposal.

(ii) In cases when an objection or proposal was made by any person other than the occupier, in which case the county valuation officer might appear and be heard without notice.

(iii) In cases where an objection or proposal was made by an occupier, in which cases the county valuation officer might appear and be heard, provided he gave the notice provided for in sects. 18 (3) and 37 (7) respectively.

W. E. Tyldesley Jones, K.C., and *Michael E. Rowe*, for the plaintiffs : It is essential that the county valuation officer should be able to attend all the proceedings of the assessment committee in order to see whether they are acting correctly. A mere report of the decision to which the assessment committee have arrived is not sufficient to enable the county valuation committee to carry out the duty imposed upon them by the Act of seeing that uniformity is secured between different rating areas. Not only does the preamble to the Act make it clear that its object is to promote uniformity, but that is the duty specifically laid upon the county valuation committee by sect. 18 (2), where they are charged to take such steps as they think fit for promoting uniformity and assisting rating authorities in the performance of their functions. The second part of this subsection is merely an instance of how this can be done and is not exhaustive, and subsect. (3), which imposes certain conditions as to notice when the committee is appearing in opposition to any objection or appeal by an occupier does not affect their overriding duty as described in subsect. (2). Apart from this particular requirement as to notice there is nothing in the Act to support the defendants' contention that the county valuation committee are not entitled to be represented at the meetings of the assessment committee unless they decide beforehand to make themselves a party to such proceedings. There are two cases dealing with the position of a county valuation officer. In *R. v. Surrey County Assessment Committee, North-Eastern Assessment Area* (1), the headnote goes too far in saying that the county valuation officer is disqualified from being present when the assessment committee are hearing the proposal. The whole point of that decision was that the officer was not entitled to be present while the assessment committee were making their decision, and we do not ask for that. *Coulsdon & Purley Urban District Council v. Surrey County Council* (2) is an instance of the proper performance of their duties by a county valuation committee.

A. S. Comyns Carr, K.C., and *J. Scott Henderson* for the defendants :

Meetings of local government bodies are *prima facie* private, and not even ratepayers have a right to be present unless it can be founded on a statute applicable to their particular case. The meetings of an assessment committee are merely an example of the doctrine laid down in *Tenby Corporation v. Mason* (3). See also *Purcell v. Sowler* (4), at p. 220, and *Pittard v. Oliver* (5), at p. 481. The only persons entitled to be present at a private meeting are those who, having a right to be parties to the proceedings, have taken steps to render themselves such. As the result of *Purcell's* case (4) an Act of Parliament was passed to regulate the position of the press, but with respect to the public, of which the county valuation officer for this purpose is a member, it is in the discretion of an assessment committee to decide whether they will admit them, and it is immaterial whether that discretion is exercised wisely or unwisely.

The promotion of uniformity in rating matters is not novel to the Act of 1925. It occupied an even more important place in the Act of 1862. As to what is meant by uniformity, see *Ladies' Hosiery & Underwear, Ltd. v. West Middlesex Assessment Committee* (6). Uniformity is only to be achieved by getting a correct assessment of every individual hereditament. If the county valuation committee considers any valuation made by the assessment committee is wrong they have their rights and can make a proposal for the amendment of the list under sect. 37, or appeal to quarter sessions.

The defendants' case really turns upon whether the plaintiffs' construction of sect. 18 is right. Subsect. (2) means that the county valuation committee must decide at the outset whether they wish to be present at proceedings of the assessment committee. They cannot be allowed to wait until the middle of the proceedings to which they have not made themselves parties, and then decide whether they wish to take part in them. Still less has their officer a right to stay there merely to obtain information. The Act provides the county valuation committee with ample means of obtaining information. They have representatives on the county council who are members of the assessment committee, and there must be representatives of the assessment committee on the county valuation committee. In addition to that, sect. 40 (6) entitles them to demand all the information they require for the discharge of their duties. It is because they are entitled to have copies of all documents that it was not thought necessary to provide that notice should be served on them. If the plaintiffs are right in their contention it would mean that when the assessment committee is revising its draft valuation list they would be able to make objections in the absence of the ratepayers, which would be contrary to sect. 27 (1), which provides that the ratepayer is entitled to be present on such an occasion. The only way in which the county valuation committee can apply to amend a valuation

list is by making a proposal under sect. 37, which in subsect. (7) provides that notice shall be given.

The headnote in *R. v. Surrey County Assessment Committee, North-Eastern Assessment Area* (1) is not wrong, as it appears from the argument that the case goes further than merely laying down that the county valuation officer is not entitled to be present when the assessment committee are considering their decision.

FARWELL, J. : I can construe the judgment in that case as being only on the one point.

Tyldesley Jones, K.C., in reply : The plaintiffs are not concerned as members of the public, but by virtue of their position under sect. 18.

FARWELL, J. : The real difficulty to my mind in your way is this. If Parliament did intend under sect. 18 (2) that your officer should be entitled to attend all or any of the meetings in question, it is a little difficult to see why it was thought fit to require notice to be given by you in some cases.

Tyldesley Jones, K.C. : Parliament does not require notice to be given of intention to attend in any case. All that it requires is that notice shall be given of intention to appear in opposition. Although we are given the right to appear in opposition we are none the less given the duty of supervising and seeing that uniformity is procured, which requires that we shall have the right to attend. The word "appear" in sect. 18 (3) and in sect. 27 (1) has a technical meaning of appearing as a party with certain consequences. In the latter subsection the right to appear is given not only to county valuation committees, but also to rating authorities, and the position of a rating authority at the hearing of the assessment committee does not depend on whether they intend to make themselves parties. The Act clearly contemplates that no meetings shall be held which they shall not be able to attend : see sched. IV, part III. "Attend" there does not mean appear as parties. There is nothing in the Act which gives a statutory right of attendance to either the rating authority or a ratepayer, but that is implicit, and it is equally necessary that the county valuation committee should be able to attend.

The defendants are wrong in their contention under sect. 37 (7). One of the previous provisions there referred to is sect. 27 (1) which relates to the hearing of any objection. The plaintiffs have a perfect right to take part in a proposal either in support or in opposition, but they cannot always say beforehand what they intend to do because they have not got the necessary information.

FARWELL, J. : This matter comes before the court by way of interlocutory motion. The plaintiffs, who are the county valuation committee for the County of Middlesex, seek by the writ in the action

against the defendants, the assessment committee for the West Middlesex Assessment Area :

(i) A declaration that the plaintiffs by their county valuation officer or other their duly authorised representative are entitled to attend meetings of the defendants during the hearing of all objections to draft valuation lists and all proposals to amend current valuation lists.

(ii) An injunction to restrain the defendants, their servants or agents from excluding the plaintiffs' county valuation officer or other their duly authorised representative from their meetings during the hearing by the defendants of any objections to draft valuation lists or of any proposals to amend current valuation lists.

The relevant facts in this case are very simple and are not in dispute. The plaintiffs have directed their county valuation officer, or some responsible person representing him, to attend the meetings of the defendants, not only for the purpose of informing himself of what takes place at those meetings, but also for the purpose of tendering information or advice and otherwise taking part in the proceedings. The defendants object to the attendance of any such person and claim the right to exclude him. The question that I have to determine is whether the defendants have such right. Both the plaintiffs and the defendants are bodies constituted by the Rating and Valuation Act, 1925, by that Act their duties and obligations are regulated, and it is in that Act, and that Act alone, that the answer to the question I have to determine must be sought. The Rating and Valuation Act, 1925, is entitled :

An Act to simplify and amend the law with respect to the making and collection of rates by the consolidation of rates and otherwise, to promote uniformity in the valuation of property for the purpose of rates, to amend the law with respect to the valuation of machinery and certain other classes of properties, and for other purposes incidental to or connected with the matters aforesaid.

It was said on behalf of the defendants that there is nothing novel in the reference in the title to promotion of uniformity, that similar words are to be found in earlier Rating Acts. I fail to appreciate the relevance of that observation. Whether the words be new or not, they do form part of the title of the Act and must be taken into consideration in considering the Act as a whole. The Act sets up new machinery for the purpose of valuing property for rating purposes. The Act is one of a considerable number of sections, but it will not, I think, be necessary for me, for the purpose of this judgment, to refer to more than comparatively few of them. Sect. 1 provides :

(1) The council of every county borough and the council of every urban and rural district shall be the rating authority for the borough or for the county district, and from and after the appointed day no authority or person other than the council shall have power to make or levy any rate within the borough or district.

(2) As from the appointed day all powers and duties of the overseers of the poor in relation to the making, levying, and collection of rates, and of any other person

who by virtue of any local Act has powers in that behalf, shall in every rating area be exercised and performed by the rating authority.

Then there are other privileges in that section.

Sect. 2 provides for the levy of, and provisions as to, general rate.

I think now I can turn to sect. 16 as the next section which for this purpose is material. It provides :

(1) Subject to the provisions of this part of this Act county boroughs and such other areas as may be constituted by schemes made under this section shall be assessment areas for the purposes of this part of this Act.

Then it provides for the scheme.

Sect. 17 (1) provides : " There shall be an assessment committee for every assessment area." It is under this section that the defendant committee is constituted. Subsect. (2) is : " The assessment committee for an assessment area shall, in the case of an assessment area being a county borough, be appointed." Then it provides how they shall be appointed and who are the persons to constitute the board. In the last subsection of that section it is enacted : " The provisions contained in the first schedule to this Act shall have effect with respect to assessment committees."

When one turns to the first schedule of the Act, the first provision there is :

Subject to the provisions of this Act, the quorum, proceedings and place of meeting of an assessment committee shall be such as the committee determine, and meetings of the committee may be held at different places from time to time as the committee think proper having regard to the public convenience.

Then there is a proviso which I need not read, and a proviso that the quorum shall not be in any case less than three. Then there are provisions for the chairman having a casting vote and minutes being kept, and other matters of that sort. Putting it quite generally, subject to the provisions of the Act, the assessment committee have the right to regulate their own proceedings.

Sect. 18 provides for county valuation committees, and under this section the plaintiff committee is constituted. It provides :

(1) For the purposes of this part of this Act there shall be established in every county a committee of the county council (to be called " the county valuation committee ") consisting of such number of persons, being members of the council of the county, as the council may think fit to appoint, and of a representative of the assessment committee for each assessment area which, or any part of which, is comprised in the area of the county to be nominated by the assessment committee.

(2) It shall be the duty of every county valuation committee to take such steps as the committee think fit for promoting uniformity in the principles and practice of valuation and assisting rating authorities and assessment committees in the performance of their functions under this part of this Act, and for the purpose of the performance of the said duty the committee shall have power, either alone or in conjunction with county valuation committees for other counties, to hold

conferences with persons representing assessment committees (including assessment committees for county boroughs), and to bring to the notice of any rating authorities or assessment committees any conclusions arrived at or recommendations made by the committee or at any such conference.

(3) A county valuation committee may, either alone or in conjunction with any rating authority, assessment committee or other county valuation committee, appear as a party to any objection or appeal under this part of this Act: Provided that the committee shall not be entitled so to appear in opposition to any objection made or appeal brought by the occupier of the hereditament affected unless not less than three days before the date of the hearing of the objection or, in the case of an appeal, such longer period as may be required by the rules relating to appeals, the committee have given notice in writing to the occupier stating their intention so to appear and the grounds of their opposition or the representations which they propose to make at the hearing.

Then I think I may pass to sect. 25, which provides for the preparation of valuation lists, and the succeeding sections deal with those matters. Sect. 31 deals with appeals to quarter sessions; I do not think it is necessary for me to refer in detail to those matters. Sect. 37 provides for the amendment of current valuation lists, and says that the lists can be revised if it be thought necessary or desirable.

I think it is not necessary for me to refer to any other sections of the Act, because the question really comes down to this: does the power which undoubtedly is given to the defendants of regulating their own meetings entitle them to exclude and refuse admission to an officer of the plaintiffs who has been directed by the plaintiffs to attend and take part in the meetings of the defendants? It is to be noticed that the power to regulate their proceedings is subject to the provisions of this Act, and in my judgment the answer to the question which I have to determine, namely, whether the defendants have the right to exclude such a person as I have mentioned, must be in the negative.

By sect. 18 (2), the plaintiffs are directed that it is the duty of every county valuation committee to take such steps as the committee think fit for promoting uniformity. If the plaintiffs, as such committee, think it right and necessary, for the purpose of promoting uniformity, to direct their officer to attend the defendants' meetings, that seems to me to be a step within the meaning of sect. 18 (2), and if they take such a step, in my judgment, it is not open to the defendants to nullify the step which the plaintiffs have taken, by refusing admission to their meetings to the person so directed by the plaintiffs to attend. In my judgment, therefore, the defendants have not the right which they claim, of excluding such a person. It must, however, be remembered that the plaintiffs, by directing their officer to attend the meetings, do not and cannot make him a member of the defendant body. The constitution of the defendant body is provided by the Act and it does not include such a person. Therefore such a person is not a member of the defendant

committee, and he is therefore not entitled to participate in the decisions to which the committee may come. That, I think, is clearly laid down by the divisional court in the case of *R. v. Surrey County Assessment Committee, North-Eastern Assessment Area* (1). In my judgment, the headnote in that case goes further than the effect of the decision as stated by the learned judges. It was a decision to the effect that a county valuation officer was not intended to be present or take any part in the decision of the committee. Secondly, it must be borne in mind that the plaintiff committee cannot direct their officer to do anything which by the Act it is necessary he should omit to do, or to omit to do anything which by the Act it is necessary he should do. Accordingly, in any cases where by the Act notices are required, or other matters of that sort are necessary, those notices, of course, must be given, and without them the plaintiffs are not entitled, either by that particular representative or anyone else, to participate in those matters for which notices are necessary.

Subject to those qualifications, it appears to me that the plaintiffs, under sect. 18 (2), have the power to direct, if they think it necessary for the purpose of promoting uniformity, that an officer of theirs should attend the meetings of the defendants and take part in those meetings to the extent which I have mentioned. In those circumstances, and for the reasons which I have endeavoured to express, I have come to the conclusion that the plaintiffs are entitled to the relief which they seek.

Motion by consent treated as the trial of the action. Declarations asked for by the writ. Liberty to apply. Costs for the plaintiffs.

Solicitors: C. W. Radcliffe (for the plaintiffs); H. G. Greenwood (for the defendants).

[Reported by C. M. YOUNG, Barrister-at-Law.]

**CRAZE v. MEYER-DUMORE BOTTTLERS' EQUIPMENT
CO., LTD.**

[COURT OF APPEAL (Greer, Greene and Scott, L.JJ.), **June 24, 25, 26, 1936.**]

Factories and Shops—Dangerous machinery—Breach of statutory duty—Liability of employer in negligence—Defence of contributory negligence.

The defendants installed in their factory a circular saw, which in breach of a statutory duty was improperly fenced. A workman was injured while testing the machinery of the saw in a manner which was held to be the direct cause of the accident. In an action for damages for personal injuries, it was argued on behalf of the workman that, in order to prevent him from obtaining compensation based upon a breach of a statutory duty, there must be contributory negligence on the part of the workman limited to acts done in breach of some order or done outside the ambit of his employment :—

HELD : the negligence of a workman which would prevent him from obtaining compensation based upon a breach of a statutory duty was negligence of the ordinary kind, and as the workman had been negligent in the present case he could not recover.

[EDITORIAL NOTE.] The point here discussed is whether in an action for breach of statutory duty there is a limitation upon the defence of contributory negligence or whether the position is the same as in an ordinary action of negligence. The suggestion was that such a defence was limited to acts done in breach of statute or order or outside the ambit of his employment, but this view was not accepted by the court.

AS TO THE LAW ON THE POINT, see **HALSBURY**, 1st Edn., Vol. 21, Negligence, p. 424, para. 720, note (c) ; and FOR CASES, see **DIGEST**, Vol. 24, p. 911, No. 81.]

Cases referred to :

- (1) *Groves v. Wimborne* (Lord), [1898] 2 Q.B. 402 ; 24 Digest 911, 80.
- (2) *Dew v. United British S.S. Co., Ltd.* (1928), 139 L.T. 628 ; Digest Supp.
- (3) *Flower v. Ebbw Vale Steel, Iron & Coal Co., Ltd.*, [1936] A.C. 206 ; Digest Supp.
- (4) *Bourke v. Butterfield & Lewis, Ltd.* (1927), 38 C.L.R. 354 ; Digest Supp.

APPEAL from a decision of **ATKINSON, J.**, given on Dec. 18, 1935.

The plaintiff, John Warren Craze, was a foreman engineer employed by the defendants, Meyer-Dumore Bottlers' Equipment Co., Ltd., who were the occupiers of a factory for the manufacture of bottle-washing plant. In Oct., 1934, a circular saw, which had no proper guards, was installed at the defendants' factory. The plaintiff protested against the installation until proper guards were provided, but the machine was erected and worked without proper guards. On Dec. 17, 1934, a carpenter, Hall, was using the saw to cut a long plank. According to the plaintiff the saw was not strong enough, and it jammed in the wood after it had cut a few feet, and he was asked to deal with it. He went up to the machine and the saw, and the only belting that he could see were, he said, stationary. Assuming that the power had been cut off, the plaintiff said he asked the carpenter, "Has the power been cut off?" and the carpenter said, "Yes." The plaintiff, desiring to test the degree

of tightness of the belt which he could see, picked up a tool and pressed it against the inside of the belt. The moment he touched it, he said, the belt began to move and the saw began to revolve, his tool was caught and his hand was jerked up and the saw cut his wrist and inflicted a serious injury. According to the carpenter, Hall, when the wood jammed the plaintiff came up and said, "Try again." The belt was moving. Hall withdrew the wood and the saw revolved again. The plaintiff then bent down, he said, and did something which he could not see and got up again holding his cut wrist. He denied that the plaintiff had asked him whether the power had been cut off.

In an action by the plaintiff for damages for personal injuries which he sustained, as he alleged, in consequence of the wood-cutting machine not being properly fenced, ATKINSON, J., accepted Hall's evidence that the belt was moving, the tendency of which was to send anything put against it upwards within a few inches of the saw. Any man of the plaintiff's experience must, he said, have appreciated that he was doing an incredibly stupid thing. In his Lordship's opinion the plaintiff had done something which an ordinary prudent man would not have attempted to do, and which was the direct cause of the accident, and he held that although there was a continuing breach by the defendants of an absolute statutory duty to fence the machine under the Factory Act, 1901, s. 10 (1) (c) and (d), the contributory negligence on the part of the plaintiff prevented him from recovering damages. The plaintiff appealed.

E. W. Cave, K.C., and *James N. Watkins* for the appellant.

Edgar Dale and *J. W. Russell* for the respondents.

Their Lordships dismissed the appeal, agreeing with the view of the facts taken by ATKINSON, J., and delivered the following judgments upon the point of law raised by the appellant.

GREER, L.J. : This is an appeal from the judgment of ATKINSON, J., in a case in which, having heard evidence both for the plaintiff and for the defendants, he decided that the defendants were not liable for an accident which happened to the plaintiff in catching his hand in a moving circular saw. The learned judge decided that fact on the ground that he was satisfied by the evidence that was given before him that the injuries from which the plaintiff suffered were due to his own negligence, and that if it had not been for his negligence the breach of the statute would not have resulted in the injury. That is conveniently called contributory negligence, but it does not mean, as was rather suggested in part of Mr. Cave's argument, negligence which is contributory along with the negligence of the other party. It means negligence which causes or contributes to the injury or damage which has happened.

An extremely interesting argument was presented before the court by Mr. Cave. Mr. Cave said that the object of the statute which requires

dangerous machinery to be guarded is in order to protect the work people, even though the workpeople are to some degree negligent, and in those circumstances he says that it has been decided by the House of Lords that, when you are dealing not with a claim for negligence but a claim for a breach of a statutory duty there must be something more than contributory negligence, in the sense of the words as they have been used on innumerable occasions by the learned judges in deciding cases. I need not refer in detail to cases which have been cited, but since the *dictum* of VAUGHAN WILLIAMS, L.J., in *Groves v. Lord Wimborne* (1) there have been innumerable cases—not reported—in which that *dictum* has been acted upon, and in addition to that there is the decision in *Dew's* case (2) in this court which, I think, disposes of the point, so far as this case is concerned, because it is clear upon the facts of that case that the negligence was not any breach of an order, but was negligence in the ordinary sense in which it has been used in relation to claims where the claim is based on the negligence of the defendants. I am not satisfied that there is anything in the decision of the House of Lords in *Flower v. Ebbw Vale Steel, Iron & Coal Co.* (3) that justifies us in refusing to apply, in the sense which I have mentioned, the defence of contributory negligence in the present case.

The judgment was a judgment of LORD ATKIN, LORD THANKERTON, LORD WRIGHT, LORD TOMLIN and LORD ALNESS. LORD TOMLIN, who was not there when the judgment was delivered, said that he agreed with the judgment of LORD ATKIN. LORD ATKIN says this in the course of his judgment, at p. 209 :

I have had the advantage of reading the opinion about to be expressed by my noble and learned friend LORD WRIGHT, and in consequence can confine what I have to say to a few words. The case involved two points: was the workman guilty of contributory negligence?; was contributory negligence a defence to a claim based upon a breach of a statutory duty? Your Lordships came to the conclusion at the hearing that contributory negligence was not established: and the second point therefore was not argued.

The second point was as to whether negligence was a defence to a claim based upon breach of statutory duty. I understand that LORD ATKIN is referring there to contributory negligence as contributory negligence in the ordinary sense in which a lawyer would understand it. He says that the other point had not been argued and he does not deal with it, but he goes on to agree with the learned judge that upon the facts of the case contributory negligence was not proved firstly because the facts of the case, unless they included disobedience to an order, were not sufficient to establish contributory negligence, and, secondly, because there was not sufficient evidence to justify a finding that there had been disobedience to an order received by the engineman. I regard LORD THANKERTON'S decision as agreeing with the speech of

LORD ATKIN, and LORD ALNESS also agrees, his speech amounting to this: that in thinking the onus was upon the defendant to prove, the decision of the House of Lords ought to be that he had not proved the case of contributory negligence. In my judgment that is all that the decision in *Flower's* case (3) is authority for. It is quite true that LORD WRIGHT discussed a number of matters which were not necessary for the decision, and in the course of his judgment indicated that there might be some doubt—I think that is the effect of his speech—as to whether the ordinary rule of contributory negligence could properly be held to apply to a case where the complaint is breach of statutory duty. Although I do not suppose it matters, that point of view is one which has considerable weight because, apart from the authorities, one would rather suppose that the necessity for guarding machinery and the necessity for a statutory provision to the effect that dangerous machinery should be guarded was accepted, and the intention of the legislature was that there should be protection, not merely for the purpose of protecting careful workpeople, because it is not the very careful workpeople that want protection, but it is those who are not careful who do want protection. That is a matter which the House of Lords may have to consider some day, but we cannot consider it having regard to the state of the authorities. For those reasons, I am of opinion that this appeal ought to be dismissed with costs.

GREENE, L.J.: I agree. It is common ground that the burden of establishing facts which would free them from liability lies on the employers. Mr. Cave addressed to us an argument as to the facts which it would be necessary for the employers to prove before they could discharge that burden, and he asked us to say that the words “contributory negligence,” which had been used in this context by many learned judges, must have placed upon them a special and limited meaning. He says that those words, when you are dealing with a defence to an action based upon breach of statutory duty, must be construed in such a way that they will include, and include only, acts amounting to a departure by a workman right outside the scope of his duties, such as would take place if he disobeyed a specific order. I find myself quite unable to take the view that the learned judges who had used the phrase “contributory negligence,” a phrase which has a well-defined meaning, were using a phrase which was misleading and inaccurate. When they used that expression, in my judgment, they intended to use it in the ordinary sense in which it can be understood and not in a very special and limited and inappropriate sense. In fact, Mr. Cave’s argument really came to this—I think this is the effect of it—that he was in substance asking this court to hold that the defence of contributory negligence is not a defence which is open in the case of a breach of statutory

duty and that whatever defence may be open it is in a different category altogether. In view of the state of the authorities, that is an argument, whatever attractions it may have, which must be addressed, not to this court, but to the House of Lords. It is pertinent to observe that in the case of *Flower v. Ebbw Vale Steel, Iron & Coal Co., Ltd.* (3), that very point was raised, but was not argued and was not decided, and it may be taken that so far as the House of Lords is concerned they regarded that as a point that was open to argument in that House, but in my judgment it is not open to argument in this court. Mr. Cave endeavoured to extract from the decision in *Flower's* case (3) comfort in two ways. First of all, he relied upon the observations of LORD WRIGHT in his speech which he said was authority for his proposition. It is to be observed that the observations of LORD WRIGHT were not concurred in in terms by the other members of the House, but further than that I think it is quite clear in reading the speech of LORD ATKIN, in which LORD THANKERTON and LORD TOMLIN, forming a majority of the House, in terms concurred, that they were not prepared, without having heard argument, to assent to any propositions on that branch of the case. As I understand Mr. Cave, he tried to obtain support from the decision in another way, because at one stage in his argument the suggestion was made to read the speeches in the case as meaning this: that they had in terms decided that it was a breach of the order, and nothing short of a breach of the order was sufficient to free the company from liability. Now, with all respect, I think that that is a misunderstanding. The decision of the learned trial judge as interpreted by the judge, which is the important point, was to this effect: that apart from the disobedience to the order there was no lack of care on the part of the workman. On the basis of that decision of fact, the House, taking a different view on the issue as to whether or not the order had been given, was left in this position: that once they were satisfied that the order had been given there was no element of negligence on the part of the workman left in the case at all. In other words, it was not that the House was taking the view that once you found there was no disobedience to orders negligence could not be established. What they found there was that on the finding of fact by the learned judge once disobedience was put out of the way there was no negligence at all in that case. The existence of the order in that case, of course, made it impossible for them to say—this is in the mind of the learned judge because he found as a fact that there was such an order—that the workman's act fell within the category of the sort of acts which any careful and reasonable workman would be expected to do. It removed it into the category of the plainly improper acts. It was on the existence of the order alone that the learned judge found.

I agree that this appeal should be dismissed with costs.

SCOTT, L.J.: In my view this court is not at liberty to depart from the decision in *Dew v. United British Steamship Co., Ltd.* (2). That was a case of a breach of statutory duty and that was a case of ordinary contributory negligence in the ordinary sense of that expression, and this court held that that contributory negligence was a defence to the action. That being so, in my view this court is bound to follow that decision. It is true that in the House of Lords in *Flower's* case (3) LORD WRIGHT discussed the question as to whether there might be a differentiation in cases of breach of statutory duty in regard to the kind of contributory negligence which ought to be regarded as a defence. That issue was discussed very usefully and, as it seems to me, with great force, in the case of *Bourke v. Butterfield & Lewis, Ltd.* (4). LORD WRIGHT'S observations were all in the nature of a hypothetical discussion on the kind of questions that may have to be decided. He was not purporting to lay down any definite principles, and it is quite clear from the opinions of the other notable lords who took part in the decision that the House was not intending to express any considered opinion on the subject. Indeed, they could not have done so in that case, as the question was not argued. Sir William Jowitt was stopped after addressing the House on the facts of the case only. The House called upon him—I was appearing for the respondent although my name has been omitted in the reports—to deal with the issue of fact as was done precisely by my Lords here, and not one word was said on either side on the question of law as to the scope of the doctrine of contributory negligence as applied to cases of statutory duty.

For those reasons I agree that the appeal should be dismissed with costs.

Solicitors: *Barlow, Lyde & Gilbert* (for the appellant); *Carpenters* (for the defendants).

[Reported by DEREK H. KITCHIN, ESQ., *Barrister-at-Law.*]

R. v. GRANT.

[COURT OF CRIMINAL APPEAL (Lord Hewart, L.C.J., Humphreys and Goddard, JJ.), July 13, 1935.]

Criminal Law—Autrefois convict—Plea of guilty at police court—Subsequent decision of magistrate to commit for trial—Criminal Justice Act, 1925 (c. 86), s. 24 (1).

The appellant was charged before a metropolitan police magistrate with larceny. He pleaded guilty. The learned magistrate committed him to quarter sessions for trial and wrote to the clerk of the peace for the County of London as follows: "I am committing for trial to-day James Grant. He pleaded guilty and consented to my jurisdiction. In view of his record and age I obtained a report during remand on bail from the Institute of Scientific Delinquency. I enclose a copy of that report. I feel it is a case quarter sessions should deal with." At the trial, before quarter sessions, the appellant was unrepresented and he did not put forward any defence or cross-examine the witnesses for the prosecution. He stated, however, that he had not had a fair trial as the magistrate told him he would give him six months hard labour and had then changed his mind and committed him for trial:—

HELD: the appellant had already been convicted of the offence charged and therefore a plea of *autrefois convict* should have been entered on the file, or the jury should have been directed to find him not guilty.

EDITORIAL NOTE. This is a very similar case to *R. v. Sheridan* (1), the distinction being that in the present case the defendant pleaded guilty. This plea of guilty is sufficient for a subsequent plea of *autrefois convict*.

FOR THE LAW, see HALSBURY, Hailsham Edn., Vol. 9, pp. 152, 153, para. 212, and FOR CASES, see DIGEST, Vol. 14, pp. 336-349, Nos. 3550-3653.]

Case referred to:

(1) *R. v. Sheridan*, [1936] 2 All E. R. 883; Digest Supp.

APPEAL from County of London Sessions. The facts appear in the judgment of the court delivered by HUMPHREYS, J.

J. E. M. Gunning for the appellant.

G. G. Raphael for the Crown.

HUMPHREYS, J.: This appellant, James Grant, is now appealing by leave of this court against his conviction at the London Quarter Sessions of larceny.

At the trial the appellant did not put forward any grounds of defence, he did not cross-examine witnesses, but when he was called upon by the learned chairman to say what he had to say to the jury, he not having pleaded guilty, he said he did not think he had had a fair trial because the magistrate had told him that he would give him six months hard labour and had later changed his mind and then committed him for trial. He, being an experienced criminal as he was, knew quite well that at quarter sessions he would get a heavier sentence than he would if dealt with by the learned magistrate. That was an informal way of raising the question that he had already been convicted of the offence upon which

he was then standing his trial by jury. For that issue there was available a letter which had been written to the clerk at quarter sessions by the learned magistrate, Mr. Claud Mullins, who had committed the appellant for trial, and which has been read to-day by Mr. Gunning, in which that learned magistrate said this, in terms: "I am committing for trial to-day James Grant. He pleaded guilty and consented to my jurisdiction. In view of his record and age I obtained a report during remand on bail from the Institute of Scientific Delinquency. I enclose a copy of that report. I feel it is a case quarter sessions should deal with."

From the history of this case it appears that there is some confusion as to the duties of justices in dealing with indictable offences. The learned chairman of quarter sessions, having all the facts before him that this man, as the learned magistrate has said, pleaded guilty, and that he was then saying, no doubt wrongly, that the learned magistrate had sentenced him, ought to have taken one of two courses. He should have inquired into the matter, and he ought to have been satisfied by the letter from the learned magistrate that there was some matter to be inquired into. He should have discharged the jury, who were trying the accused, from giving a verdict and should have directed the clerk of the court to file on behalf of the accused, who was ignorant, a plea of *autrefois convict*. The jury should then have been sworn to try that issue and the result (and there can be no question as to the result) would have been that the accused would have proved his plea and he would have been discharged. Or the learned chairman could, if the prosecution did not insist on the plea of *autrefois convict* being formally put on the file, have told the jury that, if they were satisfied that the appellant had been convicted of the offence now being tried by them, the law of this country was that no man could be convicted by two different tribunals for the same offence and they should find him not guilty. Unfortunately, the learned chairman was not alive to it and what he said to the jury was: "He has some grievance . . . but that has nothing to do with you." And so the jury convicted and he was then sentenced to twenty one month's imprisonment with hard labour.

Now the facts appear to be these. The appellant was brought before the learned magistrate and charged with larceny, an offence which is, *prima facie*, an indictable one. The learned magistrate had the accused before him on an offence which, although indictable, could in certain circumstances be dealt with summarily, and therefore it was the duty of the magistrate to pay attention to the Criminal Justice Act, 1925, s. 24, which, by subsect. (1) provides that:

Where a person who is an adult is charged before a court of summary jurisdiction with an indictable offence, being one of the offences specified in the second schedule to this Act, the court, if it thinks it expedient so to do, having regard to . . . the

character and antecedents of the accused, the nature of the offence, the absence of circumstances which would render the offence one of a grave or serious character and all the other circumstances of the case (including the adequacy of the punishment which a court of summary jurisdiction has power to inflict), and if the accused, when informed by the court of his right to be tried by a jury, consents to be dealt with summarily, may . . . deal summarily with the offence.

This court on June 29 last, in the judgment of the court, held it was the duty of the magistrate at a court of summary jurisdiction to inquire into these matters before he makes up his mind whether he will or will not deal summarily with the case. It has been suggested to us to-day by Mr. Raphael that this places the court of summary jurisdiction in a difficulty. There really is no great difficulty. If the courts of summary jurisdiction will remember, where the offence is one primarily an indictable offence, it is their duty to proceed with the case as an indictable one, that is, to take depositions, and if in the course of taking these depositions or even before the depositions are taken the magistrates are satisfied, having regard to the matters to which they are directed by sect. 24 (1), that the case is one proper to be dealt with summarily from their point of view, the court may then decide to deal summarily with the case, always assuming that the accused desires it so to do.

In *R. v. Sheridan* (1) the court decided that while a court has power to deal with the matter summarily at any stage of the proceedings, and while the court has power to commit for trial a man with regard to whom it is otherwise disposed to deal with summarily up to the time it has convicted or acquitted him, the court of summary jurisdiction has no power, once it has arrived at its decision to convict, to alter its decision because the man has been previously convicted. The only matter the court then has to deal with is the matter of sentence. Now the only difference between *Sheridan's* (1) and the present case is this: *Sheridan* pleaded not guilty, was tried by the petty sessional court and convicted. In this case the accused pleaded guilty and Mr. Raphael has rightly said that there is no distinction in law between a conviction by verdict of a jury or the court and a man being convicted by his own confession, commonly called a plea of guilty, and the decision of *Sheridan's* case (1), therefore, would be binding. The result in this case was that the man, having been asked whether he desired to be dealt with summarily—the learned magistrate ought not to invite him as to this until he has made up his mind to deal with him—the magistrate, having made up his mind to deal with him summarily, then remanded him for sentence. Then it was that something happened. Whether it was due to the society with the rather lengthy name, the Society for Scientific Delinquency, or to a report of one or two doctors who apparently examined the mind of this appellant, we do not know, but something induced the learned magistrate to change his mind and not to deal summarily with the case, but to send

it for trial, and having taken that course, the result to the appellant was that he was sentenced to twentyone months, while the maximum sentence by the learned magistrate was six months, which accounts for the view that the appellant says he has not had a fair trial.

The question the court has to deal with is whether on his trial before the jury at quarter sessions, this appellant was right in saying, which he did in fact say : " I have already been convicted of this offence " and one would have thought he was perfectly right. For that reason this appeal must be allowed and the prisoner discharged.

Solicitors : *Registrar of the Court of Criminal Appeal* (for the appellant) ; *Director of Public Prosecutions* (for the Crown).

[Reported by H. P. LANSDALE-RUTHVEN, ESQ., *Barrister-at-Law*.]

Re HEPWORTH, RASTALL v. HEPWORTH.

[CHANCERY DIVISION (Farwell, J.) **July 9, 1936.**]

Wills—Construction—Gift to "child"—Legitimated person—"Disposition"—Legitimacy Act, 1926 (c. 60), ss. 3 (1), 11.

The first defendant was a person legitimated by the Legitimacy Act, 1926 ; and as her parents were married in 1915, the date of legitimation was Jan. 1, 1927, being the date when the Act came into operation. The will of her grandfather who died in 1922, after a life interest to her father, gave certain funds to be shared between the "children" of her father who should survive that father. The father died in 1928. Under the Legitimacy Act, 1926, she was entitled to take as a "child" in respect of any "disposition" coming into operation on or after Jan. 1, 1927. On the one hand it was contended that the will was the "disposition" and as this came into operation in 1922 she could not take ; and, on the other hand, it was contended that the bequest was the "disposition," and, as this was contingent, it did not come into operation until 1928 upon the happening of the contingency :—

HELD : the "disposition" was the will and such legitimated person did not take under the gift to "children."

[EDITORIAL NOTE.] It is sought here to restrict the word "disposition," which is defined as "an assurance of any interest in property by an instrument whether *inter vivos* or by will," to a single bequest in a will as distinct from the will itself. This construction of the definition was rejected.

AS TO RIGHT OF LEGITIMATED PERSON TO TAKE UNDER WILL, see HALSBURY, *Hailsham Edn.*, Vol. 2, pp. 566, 567, para. 777, and FOR CASES, see DIGEST Supp., Bastardy, Nos. 152 (a), (b). FOR THE LEGITIMACY ACT, 1926, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 2, p. 25.]

ADJOURNED SUMMONS raising a question as to the right of a person legitimated by the operation of the Legitimacy Act, 1926, to participate in certain benefits under the will of her grandfather, John William Hepworth.

By his will dated March 27, 1918, the testator gave the whole of his residuary estate to his trustees upon trust for sale and conversion, with

power of postponement, and directed them to invest the proceeds of such sale and conversion, and to hold the proceeds of such sale and conversion and such investments upon trust for all his children, except his son Wilfred Ernest Thorburn Hepworth, who being male should attain the age of 21 years or being female should attain that age or marry, if more than one in equal shares as tenants in common. He further directed that the shares of the children should be settled, the children having the income for life on protective trusts, and that after the death of the children the trustees should stand possessed of the share of each child upon trust for the children or remoter issue of each child as such child should by deed or will appoint and in default of and subject to any such appointment in trust for the children or child of such child living at the death of the survivor of the testator and such child, and the children then living of any then deceased child of such child of the testator who should attain the age of 21 years, if more than one in equal shares, as tenants in common, provided that the children of any deceased child of such child of the testator should take equally between them the share which their parent would have taken if he or she had survived the testator and such child of the testator had attained a vested interest.

The testator died on Sept. 23, 1922, and was survived by his son Percival William Glover Hepworth, one of the five children entitled to share in the residue of his estate. On Aug. 31, 1915, Percival had married Adele Mary Biancifiore, by whom he had four daughters, the eldest of whom, Olive Josephine, the first defendant to the summons herein, was born on Jan. 26, 1915, some months before the marriage of her parents. Percival William Glover Hepworth died on Oct. 15, 1928, without having exercised the power of appointment given him in respect of his one-fifth share of the testator's residuary estate, and the question then arose whether his daughter Olive Josephine, who had become legitimated by the coming into operation of the Legitimacy Act, 1926, was entitled, having attained 21, to a share of the testator's residuary estate settled upon him and his issue.

By the Legitimacy Act, 1926, s. 3 (1) (b), a legitimated person is entitled to take any interest under any disposition coming into operation after the date of legitimation. As the date of the legitimation of Olive Josephine Hepworth was Jan. 1, 1927, the date when the Act came into operation, the short point in the present case was whether "disposition" as defined in sect. 11 of the Act, meant the will of the testator which came into operation on the date of his death, i.e., Sept. 23, 1922, or some other assurance coming into operation on a date subsequent to Jan. 1, 1927.

J. M. Paterson, for the plaintiffs, the trustees of the will of the testator, stated the facts.

Roger Turnbull, for the first defendant, *Olive Josephine Hepworth*: There are two points to be decided. What is the disposition and when did it come into operation? The disposition, having regard to the definition section, which defines it as an assurance of any interest in property whether *inter vivos* or by will, is clearly not the will itself. The only definition of "assurance" that I know is in the Mortmain and Charitable Uses Act, 1888, sect. 10 (i), which describes it as a term which is capable of the widest possible meaning. That being so the reasonable construction to place upon the term "disposition" in the present case is that it is the bequest under which this legitimated person takes.

If that is so then the date when the disposition comes into operation is clearly not the death of the testator when his will came into operation, but the date when the gift to the first defendant came into operation, which was not until the death of the tenant for life in Oct. 1928. This contention is supported by the analogy of the Act itself which, although it received the royal assent on Dec. 15, 1926, on which date it became law, was not to come into operation until Jan. 1, 1927. That is an illustration of what is meant by coming into operation, which really means becomes effective. In view of the power of appointment given to the testator's children and the other terms of the bequest, it was impossible, before the death of Percival, to know who, if anybody, would be entitled to his share, since, even if he did not exercise his power of appointment and his share fell to be divided between his children, it was only such children as were living at the death of the survivor of the testator and his child and had attained 21 or married.

C. D. Myles, for the defendants, the other children of Percival William Glover Hepworth, all of whom were infants: The date when the disposition came into operation was the date of the testator's death. This is an assurance of property by will, since it was a gift contained in a will. Although it was an interest which was expectant on the death of the tenant for life, it was an interest which anyone who was entitled to it could mortgage, sell or dispose of. It is not vested because it is contingent in its terms, but it is not merely a *spes successionis*, because it is an interest which came into operation when the will came into operation, and the will came into operation on the death of the testator, which was before the date of the legitimation. It therefore comes within sect. 10 (2) of the Act which provides that nothing in the Act shall affect the operation or construction of any disposition coming into operation before the commencement of the Act.

J. Neville Gray, for the remaining defendants, who were interested in Percival's share if none of his children attained a vested interest adopted *Myles'* argument.

FARWELL, J. : The question I have to determine on this summons really depends upon the construction which ought to be put upon the Legitimacy Act, 1926. It is a question which arises in the administration of the estate of one John William Hepworth, deceased, who made his will on Mar. 27, 1918, and who died on Sept. 23, 1922. By that will the testator gave various legacies to which I need not refer, and then he gave the whole of his residuary estate to his trustees upon the usual trust for sale and conversion with power of postponement and with direction to invest such proceeds of sale and conversion and to hold the proceeds of such sale and conversion and such investments upon trust for all and any his children except his son Wilfred Ernest Thorburn Hepworth who being male should attain the age of 21 years or being female should attain that age or marry if more than one in equal shares as tenants in common. He further directed that the shares of the children should be settled, the children having the income for life on protective trusts, and that after the death of the children the trustees should stand possessed of the share of each child upon trust for the children or remoter issue of such child as such child should by deed or will appoint and in default of and subject to any such appointment in trust for the children or child of such child living at the death of the survivor of the testator and such child and the children then living of any then deceased child of such child of the testator who should attain the age of 21 years if more than one in equal shares as tenants in common. Then there is a proviso that the children of any deceased child of such child of the testator should take equally between them the share which their parent would have taken if he or she had survived the testator and such child of the testator and attained a vested interest. The only other clause to which I need refer is an accruer clause, the other clauses in the will not being relevant to anything which I have to settle.

The difficulty that has arisen in this case comes about in this way. The testator had six children, but one of them is expressly omitted from the will, so that the residuary estate was divisible into fifths. One of these five children was a son called Percival. Percival married his wife on Aug. 21, 1915, but that was after the birth of his daughter, the first defendant to this summons, she being born on Jan. 26, 1915. Percival died in Oct. 1928, without having exercised the power of appointment given him by the will, and thereupon a one fifth share of the residuary estate of the testator became distributable among his children, who became entitled in accordance with the provisions of the testator's will, and the question which I have to determine is whether the first defendant, under the circumstances, is entitled to participate with the other children of Percival in this portion of the estate. It is, I think, quite plain that, apart from the Legitimacy Act, 1926, the first defendant could have no claim to participate at all, because it is well

settled that, *prima facie*, a gift to a child or children, means a legitimate child or children and no other. Accordingly, although no doubt the lady in question has now become the legitimated child of her father and mother, if the Legitimacy Act had not been passed, it is quite plain that she could not have claimed at all. Under these circumstances if she is to claim as one of the children of the son of the testator it must be by virtue of the Act and by virtue of nothing else.

The Legitimacy Act, 1926, is entitled "An Act to amend the law relating to children born out of wedlock," and the date on which the Act received the royal assent was Dec. 15, 1926, although the Act itself provides that it is not to come into operation until Jan. 1, 1927. Sect. 1 of the Act provides :

(1) Subject to the provisions of this section, where the parents of an illegitimate person marry or have married one another, whether before or after the commencement of this Act, the marriage shall, if the father of the illegitimate person was or is at the date of the marriage domiciled in England or Wales, render that person, if living, legitimate from the commencement of this Act, or from the date of the marriage, whichever last happens.

Pausing there for a moment, it is not suggested in this case that the father of the child in question was not domiciled in England or Wales, but it is material to notice that the earliest possible date at which a person under this Act can become legitimated is the commencement of the Act itself, because it is either the commencement of the Act or the date of the marriage, whichever last happened, and if the marriage takes place after the date of the Act, then the date of the marriage is the material date, but if the marriage has taken place before the Act has come into force then the material date is Jan. 1, 1927.

Then sect. 1 goes on to provide :

(2) Nothing in this Act shall operate to legitimate a person whose father or mother was married to a third person when the illegitimate person was born.

(3) The legitimation of a person under this Act does not enable him or his spouse, children or remoter issue to take any interest in real or personal property save as is hereinafter in this Act expressly provided.

I need not read sect. 2, but sect. 3 provides :

(1) Subject to the provisions of this Act, a legitimated person and his spouse, children or more remote issue shall be entitled to take any interest—

(b) under any disposition coming into operation after the date of legitimation ;
. . . in like manner as if the legitimated person had been born legitimate.

I think I need not refer to any other section until I come to sect. 10, which provides :

(2) Nothing in this Act shall affect the operation or construction of any disposition coming into operation before the commencement of this Act, or affect any rights under the intestacy of a person dying before the commencement of this Act.

Finally there is the definition clause, which is sect. 11, in some ways

a most important section. That section defines "disposition" in the following way :

The expression "disposition" means an assurance of any interest in property by any instrument whether *inter vivos* or by will.

Now it is to be noticed that the testator in this case died in 1922, and therefore, if the disposition in this case is the will of the testator, that is to say the date at which the will became operative, it is quite plain that this lady is not entitled to participate, because the disposition under which she would take is a disposition made before the date of the legitimation. But it will be otherwise if I can accept the construction which I have been invited by Mr. Turnbull to put upon the word "disposition," and can hold that it means, if I understand his argument, the moment at which under the will, whenever made, the particular benefit given to the legitimated person becomes a vested interest. He says that in this case until the death of Percival, the father of the lady, the whole of this gift was contingent. No one could say what it was, and accordingly, until the father died, there was no disposition to this daughter or any other child or person, and the disposition, therefore, for the purposes of this Act, means the death of Percival, the father of the lady.

I feel some little sympathy with the first defendant in this case, and I have listened with much interest to the very ingenious and interesting argument which Mr. Turnbull has submitted to me. But I am quite unable to accept it. In my judgment it is really quite plain that the "disposition" in this case is the will of the testator. It cannot be intended, in my judgment, that the date of the disposition should be some date at which some benefit given to a beneficiary ceases to be contingent and becomes vested and payable. By the Act the disposition may be an assurance of property *inter vivos* or it may be an assurance by will. In my judgment the assurance here is an assurance by will, since it is impossible to read this definition clause as meaning, not the will of the testator, but the moment of time, and it may be various moments of time, at which the various benefits given under the will become operative. In my judgment it is plain that disposition here was the date of the death of the testator, and since, at that date, the lady was not in a position to claim any portion of the property I am bound to hold that she is not entitled to share in the residuary estate of the testator.

Solicitors : *Herbert G. Rastall & Jones* (for the plaintiff and the first defendant, Olive Josephine Hepworth) ; *Maddison, Stirling, Humm & Willett* (for the defendants, the other children of Percival William Glover Hepworth) ; *Vizard, Oldham, Crowder & Cash* (for the remaining defendants).

[Reported by C. M. YOUNG, Barrister-at-Law.]

BURNHAM v. BOYER AND BROWN.

[KING'S BENCH DIVISION (Horridge, J.), July 15, 1936.]

Tort—Joint tortfeasors—Contribution—Law Reform (Married Women and Tortfeasors) Act, 1935 (c. 30), s. 6.

The plaintiff, who was upon the premises of the defendant in circumstances which made him in law an invitee, fell down a hole. The hole had been left uncovered by the negligence of a contractor who was carrying out certain work upon the premises, and he was added as a third party, as the defendant alleged that the contractor was liable to contribute towards the damages. The damages were agreed at £200 and the action proceeded solely in respect of the claim for indemnity or contribution by the defendant against the third party:—

HELD: by virtue of the Law Reform (Married Women and Tortfeasors) Act, 1935, s. 6, the third party could be ordered to contribute to the damages, and in the circumstances should contribute one half of the damages.

SEMBLE: it is not necessary in a claim under the Law Reform (Married Women and Tortfeasors) Act, 1935, s. 6, that the statute be pleaded.

[EDITORIAL NOTE.] In this case the defendant successfully claims contribution from a joint tortfeasor whom he has added as a third party for that purpose.

FOR THE LAW REFORM (MARRIED WOMEN AND TORTFEASORS) ACT, 1935, s. 6, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 28, p. 473. FOR FORMER LAW, see HALSBURY, 1st Edn., Vol. 27, Tort, pp. 487-489, paras. 955-957, and DIGEST, Vol. 42, pp. 979-982, Nos. 95-127.]

Cases referred to:

- (1) *Kimber v. Gas Light & Coke Co.*, [1918] 1 K.B. 439; 36 Digest 18, 83.
- (2) *Corby v. Hill* (1858), 4 C.B.N.S. 556; 36 Digest 49, 304.

ACTION for damages for personal injuries caused by the negligence of the defendant and of the third party.

The plaintiff who was upon the premises of the defendant in circumstances which made him in law an invitee fell down a hole. The hole had been left uncovered by the negligence of a contractor who was carrying out certain work upon the premises and he was added as a third party, as the defendant alleged that the contractor was liable to contribute towards the damages. The damages were agreed at £200. and the action proceeded solely in respect of the claim for indemnity or contribution by the defendant against the third party.

C. Doughty, K.C., and *Storry Deans* for the defendant: There is here negligence of both defendants and contribution can be ordered under the Law Reform (Married Women and Tortfeasors) Act, 1935, s. 6.

T. F. Davis for the third party: There is no liability on the contractor (*Kimber v. Gas Light & Coke Co.* (1), *Corby v. Hill* (2)). In any event there is only one tort by either one defendant or the other, and not a joint tort. The statute has not been pleaded.

HORRIDGE, J. : In this case the plaintiff in the action fell down a hole on the premises of the defendant. The defendant has settled that claim for £200 and costs, and he now seeks to get indemnity from Mr. Brown, the third party. He would not be entitled to that, because he would be a joint tortfeasor, were it not for the Law Reform (Married Women and Tortfeasors) Act, 1935 ; and if there is any point about that not having been pleaded, I should certainly give leave to amend to add that the plaintiff relied upon that Act. The ground upon which it is put is the ground which is established by the cases which have been cited, that it is the duty of Brown "to carry on his work with due precautions for the safety of those whom he knows, or ought reasonably to know, may be lawfully in the vicinity of his work ; and the most obvious precaution would be to warn." That is in the judgment of SCRUTTON, L.J., in the Court of Appeal in *Kimber v. Gas Light & Coke Co.* (1) at p. 447. I think also the judgment of WILLES, J., in *Corby v. Hill* (2), is to the same effect. Here the third party was in sole charge of the work. He left the work, apparently, having first put up a tarpaulin for the purpose of being a guard, and then took it away and left the hole exposed, so that any person using the yard on business would be extremely likely to fall into the hole. He must contribute to the extent of one-half the claim.

There will be judgment for the defendant against the third party for £100 and half the plaintiff's costs, and the costs of the defendant against the third party.

HORRIDGE, J. : Do you want an amendment, Mr. Doughty ?

Doughty, K.C. : No, my Lord. If my friend had taken the point in his defence that I had no cause of action owing to being a joint tortfeasor, I should then have replied at once by saying : "Here is this Act." I do not state the law in my statement of claim : I only state the facts upon which I rely.

HORRIDGE, J. : If you are content, I am not going to make an amendment.

Solicitors : *Thompson & Mattingly* (for the defendant) ; *C. Howe Browne* (for the third party).

[Reported by GERALD ABRAHAM, ESQ., Barrister-at-Law.]

PENNSYLVANIA SHIPPING CO. v. COMPAGNIE NATIONALE
DE NAVIGATION.

[KING'S BENCH DIVISION (Branson, J.), **June 22, 24, 25, July 3, 1936.**]

Arbitration—Action to restrain—Contract with arbitration clause—Pleading—Contract—Representation—Merger in contract—Condition precedent.

After protracted negotiations the plaintiffs' brokers on June 12, 1934, signed on their behalf a time charter chartering the defendants' tanker for twelve months with the option of cancelling it if the vessel was not ready by July 15. The plaintiffs had asked the defendants for details of pipe lines and heating coils, and received a reply as follows: "Pipe lines 350 mm. intake; 300 mm. outlet; heating coils fitted right at bottom of tanks." These statements were embodied as "guaranteed" in the charterparty which also contained an arbitration clause. Upon inspection it was found that these statements were not correct, and the plaintiffs cabled their agents not to sign the charter, but it had, in fact, already been signed, though it was retained in the possession of such agents. The ship was required for the carriage of molasses, for which without certain alterations she was not suitable. These alterations were not made, and ultimately the plaintiffs refused to take the ship:—

HELD: (i) the charterparty had become a contract binding upon the parties.

(ii) the representations made before the contract was entered into had become merged in the contract by being embodied therein, and the question was therefore not one of rescission, but whether these representations had become conditions precedent for the breach of which the plaintiffs became entitled to and did repudiate it.

(iii) the representations, being "guaranteed," had become conditions precedent, and the plaintiffs had properly repudiated the contract.

It was further contended that once the conclusion was reached that the charterparty became binding upon the parties the action should be dismissed with costs, as the arbitration clause had become operative. The pleadings, it was contended, appeared to be framed to deal only with the question whether the arbitrator had or had not jurisdiction, and the defendants were not entitled to ask for a stay of the action:—

HELD: (iv) it being no longer necessary to plead conclusions of law, the pleading was sufficient in law to raise the question whether the plaintiffs were entitled to and did repudiate the contract and, if the defendants intended to rely upon this contention, they should have applied for a stay of the action under the Arbitration Acts, 1889-1934, in the ordinary way.

[EDITORIAL NOTE.] Apart from dealing with the position under an arbitration clause where it is doubtful if the contract has come into force or not, this case deals for the first time with the question of representations, made prior to the contract, being incorporated therein so as to become merged in it. In the present case there is held to be such a merger, and the representations become conditions precedent to the contract.

AS TO CONDITIONS OF A CONTRACT, see HALSBURY, Hailsham Edn., Vol. 7, pp. 220-225, paras. 299-308; and FOR CASES, see DIGEST, Vol. 12, pp. 409-436, Nos. 3303-3533.]

Cases referred to:

(1) *Bell v. Lever Bros., Ltd.*, [1932] A.C. 161; Digest Supp.

(2) *Bettini v. Gye* (1876), 1 Q.B.D. 183 ; 12 Digest 424, 3408.

(3) *Glaholm v. Hays* (1841), 2 Man. & G. 257 ; 41 Digest 331, 1867.

ACTION by a shipping company of Philadelphia, U.S.A., claiming (i) an injunction against the defendants from proceeding or attempting to proceed with an arbitration with reference to any dispute between the parties in respect of the steamer "Vendémiaire"; (ii) a declaration that a charterparty, dated May 15, 1934, made between the parties was not and never was binding on them; and (iii) a rescission of the charterparty on the ground of misrepresentation.

The charterparty, clause 44, read :

Any dispute arising under this charter shall be settled in London by arbitration, the owners and charterers each appointing an arbitrator and the two so chosen, if they do not agree, shall appoint a third, the decision of whom shall be final. Should either party refuse or neglect to appoint an arbitrator within 21 days of being required to do so by the other party, the arbitrator appointed may make a final decision alone, and this decision shall be binding on both parties.

On July 26, 1934, defendants, in conformity with this clause nominated Mr. A. W. Davidson as their arbitrator and required the plaintiffs to appoint their arbitrator. The plaintiffs replied that as the charterparty was not binding upon them they need not submit to arbitration. Mr. Davidson died before he had acted as arbitrator and the defendants appointed Mr. H. C. Brewer in his place. The plaintiffs pleaded further that, if the charterparty were ever binding upon them, they were induced by untrue representations regarding material parts of the ship. The plaintiffs further relied upon clause 38 of the charterparty, which read :

Vessel is not to be delivered to charterers before June 15, 1934, and charterers to have option of cancelling this charterparty if vessel is not ready and at their disposal on or before July 15, 1934,

and as the defendants failed to deliver the vessel by July 15, 1934, the plaintiffs exercised this option under clause 38 and cancelled the charterparty. The defence was that the arbitration clause in the charterparty was valid; that the representations in respect of the ship were true; that the vessel was tendered to the plaintiffs' representative, Mr. Watters, on June 25, 1934, and that the plaintiffs failed to take delivery and repudiated the charterparty.

K. Carpmael, K.C., and *E. E. Addis* for the plaintiffs.

H. U. Willink, K.C., and *Cyril Miller* for the defendants.

Carpmael, K.C. : Although there was no suggestion of fraud, the vessel was not as represented, and the plaintiffs claimed rescission of the charterparty on that ground alone. The plaintiffs sent their representative, Mr. Watters, to inspect the ship, but he refused to accept her as she did not correspond to the description given of her by the defendants. She

had been chartered for the purpose of carrying molasses, and she did not fulfil the required conditions.

Cyril Miller: The court should not be troubled with this case, for there was no reason why it should not proceed before an arbitrator.

Carpmael, K.C.: Mr. Miller had his remedy under the Arbitration Acts. He was now too late. The plaintiffs desired rescission of the contract, and this the arbitrator could not order.

BRANSON, J., decided in favour of the plaintiffs, and the action proceeded.

Willink, K.C.: The facts pleaded did not allege mutual mistake. The question was merely one of construction, and ambiguity in subsidiary clauses did not render a written contract void.

BRANSON, J.: This case arises out of the following circumstances. On June 12, 1934, the plaintiffs' brokers signed a time charter dated May 15, chartering the defendants' tanker "Vendémiaire" for twelve months with the option of cancelling it if the vessel was not ready and at their disposal by July 15, 1934. The charter was the outcome of protracted negotiations, in the course of which the plaintiffs, on May 2, 1934, had asked of the defendants, amongst other things, what was the diameter of the ship's cargo lines and how many inches from her bottom the heater coils were placed, to which questions the defendants' brokers had replied on the same day: "Pipe lines 350 millimeters intake; 300 millimeters outlet; heating coils fitted right at bottom of tanks." These statements were embodied in the charterparty as "guaranteed" by the defendants in clauses 45 and 51. The charterparty also contained an arbitration clause, clause 44. On June 10, Mr. Watters, the plaintiffs' marine superintendent, arrived at Brest, where the ship lay. He inspected her on the 11th, and having done so, telegraphed to the plaintiffs, informing them that the vessel differed in various ways from the description given. Immediately upon the receipt of this telegram the plaintiffs cabled their brokers not to sign the charterparty, but the cable did not arrive in time to prevent the plaintiffs' brokers signing the charterparty on June 12, and informing the defendants that they had done so. In view of the cable, however, the plaintiffs' brokers retained the charterparty in their own possession.

In the meantime, Mr. Watters made a fuller examination of the ship and raised a number of questions as to her suitability for the trade for which the plaintiffs required her. So far as material, they related to the following points: (i) The pipe lines ended in branches to each tank, port and starboard, of a diameter just over 7 ins., whereas the lesser of the two diameters given in the defendants' telegram of May 2 was 11½ ins. (ii) The heating coils were fitted above the ship's frames, which were transverse frames 10 ins. deep, and so were some 11 ins. or 12 ins.

above the ship's bottom. The fact that the ship was transverse framed came as a surprise to the plaintiffs and their advisers, because the ship was described by Buriacan Veritas as being longitudinally framed, and the plaintiffs took the view that she could not be made suitable for the carriage of molasses unless a large number of limber holes were burned in her transverse frames. There then followed negotiations, some without prejudice, and some not so described, the effect of which was that the plaintiffs were insisting that they were not bound to take the vessel, but were prepared to do so if the defendants would make her conform to the description given of her, and the defendants were offering to make certain alterations to her if the plaintiffs would share in the expense of doing so. Pending these negotiations, the defendants continued preparing the ship for sea in her then condition as regards construction and equipment, but did nothing to her cargo lines or heating lines to put them into conformity with the description of them given before the charterparty was signed and embodied in it as signed. Finally, on June 21, the defendants informed the plaintiffs that the ship would be tendered on June 23, to which the plaintiffs replied that the vessel was not according to particulars and that they would not accept her unless an agreement was reached. On June 25 the ship was formally tendered. The plaintiffs refused her on the ground that she did not accord with the description given of her, and stated that they would hold the defendants liable in damages. On June 28, 29, 1934, the plaintiffs cabled the defendants making further suggestions for compromise, and on the 30th the defendants replied insisting on fulfilment by the plaintiffs of the charterparty, and concluding :

If not, consider you are not fulfilling charter we consider same cancelled, hold you responsible for all costs and damages, will claim arbitration.

On July 3, 1934, no reply having been received by them to their cable of June 30, the defendants informed their brokers that they considered they had now cancelled the charter and were free to employ the steamer elsewhere, and asked for the name of a suitable arbitrator. On the same day the plaintiffs cabled the defendants refusing to take the ship as she was, and ending : " No valid charter exists, nothing to arbitrate." The defendants then proceeded to appoint an arbitrator. The plaintiffs took some small part under protest. The arbitrator fell ill and ultimately died, and a fresh arbitrator was appointed by the defendants, whereupon the plaintiffs on July 3 instituted the present action. In it they claimed, firstly, an injunction to restrain the defendants from proceeding with the arbitration on the ground that their agents had no authority to sign the charterparty, so that there was no submission to arbitration. This point is now given up. Next, they claimed that the charterparty was signed by a mistake as to the dimensions of the pipe lines. This point,

too, was abandoned before me, and it becomes unnecessary, therefore, to consider whether the mistake alleged was sufficient within the law as explained in *Bell v. Lever Bros., Ltd.* (1) to entitle the plaintiffs to have the contract set aside. Thirdly, they claimed that if the charterparty was ever binding upon them, they were induced to enter into it on the faith of material representations which have turned out to be false. The representations relied on are those already referred to as having been made in the course of negotiations and subsequently embodied in the charterparty. Upon this head the plaintiffs ask for rescission of the charter. Lastly, the plaintiffs allege that the ship was not ready by the cancelling date, and that they were entitled to, and did, exercise their option to cancel under clause 38 of the charterparty. No further facts were relied upon under this head, beyond those said to justify rescission of the charterparty.

The first matter for consideration is whether representations which have induced a contract remain a ground for setting that contract aside although they have been embodied in the contract and become part of its terms. The point appears never to have been decided, which is perhaps not surprising, considering that normally the remedy of the injured party for breach of the contract would be fuller than it would be if he were confined to rescission. In fact, it only becomes material in the present case on the question whether the arbitrator ever got jurisdiction to decide between the parties. Light is thrown upon it in the discussion of the distinction between representations inducing a contract and terms of a completed contract in *ANSON ON CONTRACT*, 17th Edn., at pp. 173 *et seq.* It is there pointed out that at common law if an innocent misrepresentation did not afterwards become part of the contract its untruth was immaterial. In such a case equity might intervene to avoid or rescind the contract. But where the representation has been embodied in the contract, there the courts of common law could deal with it according to whether it was a condition entitling the injured party to repudiate the contract or a warranty giving rise only to an action *ex contractu* for damages. The representation thus becomes merged in the higher contractual right, and there was no need to resort to equity for rescission. The fusion of law and equity does not affect this result, as *ANSON* correctly states at p. 183 :

It is perhaps well to add that the Judicature Act has not of course affected the common law rules regarding an innocent representation which has become a term of the contract, but the further discussion of this matter falls under the subject of breach of contract. The equitable remedy of rescission merely supplements these rules, as it can provide for the case, to which they did not apply, of an innocent misrepresentation which is not a term in the contract.

The plaintiffs cannot get rescission of the contract on the ground of misrepresentation inducing it. It is unnecessary, therefore, to discuss

the interesting question whether, had the misrepresentations not been incorporated in the contract, they would have been sufficient to entitle the plaintiffs to rescission. The plaintiffs were bound to perform the charterparty unless it contained conditions for the breach of which they became entitled to and did repudiate it. It was contended on behalf of the defendants that once the conclusion is reached that the charterparty became binding upon the parties the proper course is to dismiss the present action with costs and to leave the parties to fight out their quarrel before the arbitrator appointed under clause 44. The argument is that arbitration proceedings having been initiated under the charterparty the court would only interfere to stop them if it were shown that there was no binding submission and that the pleadings do not ask for the intervention of the court on any other ground. It is a pity that the points of claim do not draw more clearly than they do the distinction between the right to rescission of the contract on the ground of misrepresentation and the right to repudiate on the ground of non-fulfilment of conditions contained in it. But nowadays a pleading need not state conclusions of law, and the facts relied upon by the plaintiffs are all set out under para. 5 of the points of claim, one and the same set of facts being pleaded both as representations made to induce the contract and as embodied in the contract itself. The pleading, therefore, is sufficient to allow the plaintiffs to raise the point that they were entitled to and did repudiate the charterparty for breach of conditions. The plaintiffs contended that it was too late for the defendants to ask the court to decline jurisdiction over matters as to which the contract if valid gave jurisdiction to the arbitrator because the defendants did not apply for a stay of such parts of the action as fell within the jurisdiction, if any, of the arbitrator. The defendants replied that as the action appeared to be framed to deal only with the question whether the arbitrator had or had not jurisdiction they could not apply for a stay or put in a counterclaim. The answer to this is that the points of claim, in para. 7 at all events, show clearly that the plaintiffs intended, if the court should hold that the charterparty was binding, to ask the court for relief under the terms of it, so that if the defendants had desired that the court should leave matters arising under the charterparty for decision by the arbitrator they might and should have applied for a stay; whether they would have got one or not is another question in view of the extent to which the same facts are involved throughout. The whole of the facts were gone into before me, and I propose, therefore, to decide all the issues raised, though they arise under the contract.

I turn then to the charter to see which, if any, of those of its stipulations, which are alleged not to have been fulfilled, should be construed as conditions. This is always a somewhat difficult matter.

I approach it with the following principles in mind. First, that stated by BLACKBURN, J., in *Bettini v. Gye* (2), at p. 187 :

Parties may think some matter, apparently of very little importance, essential ; and if they sufficiently express an intention to make the literal fulfilment of such a thing a condition precedent, it will be one ;

and, secondly, that stated by TINDAL, C.J., in *Glaholm v. Hays* (3), at p. 266 :

Whether a particular clause in a charterparty shall be held to be a condition, upon the non-performance of which by the one party, the other is at liberty to abandon the contract, and consider it at an end . . . must depend upon the intention of the parties to be collected, in each particular case, from the terms of the agreement itself, and from the subject matter to which it relates.

The charterparty, after the usual exordium, begins with four clauses stating that " the owners guarantee " so and so, all relating to the present condition of the ship. The expression " the owners guarantee " also appears in clauses 29, 30, 39, 45, 50, 51 and 52, all of which, except clause 30, a breach of which would render the vessel useless for the carriage of more than one quality of fluid, also relate to the present condition of the ship. In the remaining clauses other words are used, such as " the owners undertake," " the owners to provide," " the owners agree," and so forth. As a matter of pure construction I think that the word " guarantee " in eleven of the 52 clauses shows an intention to lay a special emphasis upon the obligations assumed under these clauses and to treat them as conditions of the contract as distinguished from mere warranties. To use the language of TINDAL, C.J., in *Glaholm v. Hays* (3), at p. 268 :

the form of the stipulation is more nearly in the language of condition than in that of agreement.

The only argument urged against giving them this meaning is that some of them, as, for instance, clause 1 and clause 39, which speak of the vessel being in " every way fitted " for the carriage of molasses and the burning of liquid fuel respectively, might be broken if some insignificant fitting were missing and that the parties could not have intended that the charterers should be entitled to repudiate the charter on such a ground. The answer to this argument is that business men frequently trust each other not to act unreasonably, and it would be wrong to disregard the use of special language on such a ground.

If one turns from the precise language to a consideration of the subject matter of the contract the same result follows. The ship was required by the plaintiffs, as the defendants knew, for the carriage of molasses, which is a special trade for which the ship had not been designed. It is essential for the profitable carriage of molasses that the pipe lines should be of large diameter and the heating coils as close to

the bottom of the tanks as possible, and I am satisfied upon the evidence that for the purposes of the molasses trade a ship with heating coils fitted right at the bottom of her tanks and with pipe lines nowhere less than 10 ins. in diameter is a different thing in substance from the "Vendémiaire" with her coils 11 to 12 ins. above her bottom and pipe lines ending in two branches of $7\frac{1}{2}$ ins. I am satisfied that nobody would, as an ordinary commercial proposition, charter such a vessel as the "Vendémiaire" for use in the molasses trade. Mr. Watters and Mr. Garratt were quite definite on this point, and all that Mr. Scott, called for the defendants, could say was that she would do for molasses, but he would not choose her if he could get a better. The stipulation that her heating coils were right at the bottom of the tanks indicated that she was a longitudinally framed ship, for it is not a commercial possibility to put coils at the bottom of the tanks in a transverse framed ship. Transverse framed ships are so unsuited to the carriage of molasses that none of the witnesses called knew of any one having been so used. I have not forgotten that a plan produced by Mr. Watters, which he had before the charterparty was signed, would, on careful examination, have led an engineer to think the "Vendémiaire" was transverse framed; but he did not observe it, and first knew that she was transverse framed when he inspected her. As this was just before the charterparty was signed I do not attach any importance to the plan. The suggestion that a large number of limber holes should be cut in the transverse frames to mitigate the difficulty of drainage caused by them was only a suggestion for a comparison; as it was not adopted the question whether it was practicable or not does not arise.

For these reasons I hold that the plaintiffs were entitled, under the contract, to refuse the "Vendémiaire" when tendered to them. That they did so refuse is beyond question. The last point made by the plaintiffs is that by reason of the non fulfilment of the stipulations already dealt with the ship was not ready by the cancelling date and that the plaintiffs were entitled to and did refuse her on that ground. There is nothing in this point. There was, in fact, no exercise of the option to cancel given in clause 38, nor do I think that clause 38 applies at all in the circumstances of the present case. The result is that the plaintiffs are entitled to a declaration that they were not bound to perform the charterparty.

The last question is as to costs. The defendants contend that as the plaintiffs have failed on the two points which were not within the jurisdiction of the arbitrator they should be made to pay the costs of the action. There might have been something to be said for this suggestion had the defendants moved to stay the action on the grounds within the arbitrator's jurisdiction in the event of the court holding that there was a valid submission. In the circumstances there is nothing

in it. The whole trouble arose owing to the default of the defendants in giving wrong information about the ship, and I think that the costs should be the plaintiffs' in the usual way.

Solicitors: *Thomas Cooper & Co.* (for the plaintiffs); *Middleton, Lewis & Clarke* (for the defendants).

[*Reported by* FRANK ROWE, ESQ., *Barrister-at-Law.*]

INLAND REVENUE COMMISSIONERS *v.* BARNATO.[COURT OF APPEAL (Lord Wright, M.R., Slessor and Romer, L.JJ.),
July 8, 9, 10, 13, 1936.]*Income Tax—Interest—Interest as damages—Claim for account—No allegation of fraud or breach of trust—Interest allowed in account.*

An infant was entitled under two wills to funds on attaining his majority. On an account being taken the trustees were found to have made serious errors. The *cestui que trust* issued a writ claiming an account and other relief but not alleging fraud or breach of trust. A consent order was made containing, *inter alia*, an admission by the defendant trustees that they were chargeable with compound interest on all moneys due to the plaintiff. The taking of the account was referred to accountants and a special referee, who drew up a detailed award in which certain sums were shown as interest. The commissioners of inland revenue sought to assess these sums to super tax. The *cestui que trust* appealed to the special commissioners for income tax on the ground that the whole amount of the award was capital. The special commissioners found, in his favour, that the sums which had been calculated on an interest basis were interest in the nature of damages or compensation, and not interest within the meaning of the Income Tax Acts. On appeal to the High Court, the learned judge reversed this decision, and the *cestui que trust* appealed:—

HELD: (i) there was an allocation by the special referee of a sum calculated on an interest basis.

(ii) as there had been no breach of trust and the parties had consented to the order of the court, this sum was interest payable not by way of damages or compensation, but under a contract and therefore liable to tax.

[EDITORIAL NOTE.] The point at issue here, though one of great difficulty, is within very narrow limits. The question is whether certain interest charged on sums which trustees had failed to include in accounts rendered to their beneficiary, was yearly interest which was subject to income tax, or was interest in the nature of damages. As there was no suggestion of fraud or indeed of a breach of trust, the interest was held not to be damages, it being clear that where accounts are taken under the equitable jurisdiction of the court, there is no power to award damages.

AS TO INTEREST AS DAMAGES, see HALSBURY, Hailsham Edn., Vol. 17, pp. 233, 234, para. 472; and FOR CASES, see DIGEST, Vol. 28, pp. 69-72, Nos. 368-380.]

Cases referred to:

- (1) *Vyse v. Foster* (1872), 8 Ch. App. 309, (1874), L.R. 7 H.L. 318; 24 Digest 691, 7168.
- (2) *Re National Bank of Wales*, [1899] 2 Ch. 629; 28 Digest 71, 373.
- (3) *Re Lands Allotment Co.*, [1894] 1 Ch. 616; 9 Digest 524, 3444.
- (4) *Schulze v. Bensted (Surveyor of Taxes)* (1915), 7 Tax Cas. 30; 28 Digest 63, Case (g).
- (5) *Simpson v. Maurice's Executors* (1929), 14 Tax Cas. 580; Digest Supp.
- (6) *Smith v. Smith*, [1923] P. 128; 27 Digest 398, 3955.
- (7) *Sweet v. Macdiarmid (or Henderson)* (1920), 7 Tax Cas. 640; 28 Digest 63, Case (r).
- (8) *Smith v. Law Guarantee & Trust Society, Ltd.*, [1904] 2 Ch. 569; 28 Digest 70, 369b.
- (9) *Gliksten, J. & Son, Ltd. v. Green*, [1929] A.C. 381; 14 Tax Cas. 364; Digest Supp.

APPEAL from a judgment of SINGLETON, J., delivered on Dec. 7, 1934, in the King's Bench Division, reversing a finding of the Special Commissioners for Income Tax, on a case stated by them.

The appellant, Capt. Woolf Barnato, became as an infant beneficially entitled to property under the wills of his father and of an uncle, both of whom were partners in a firm known as Barnato Brothers. Each left him £250,000 out of their capital in the firm, in trust to accumulate the profits and interest until he should be 21 and become a partner in the firm. In Sept., 1916, he attained his majority, and he was later admitted to partnership formally for the purpose of satisfying certain terms of the bequest. The partnership was dissolved in February, 1917, and he became entitled to the two legacies and all the accumulations.

The trustees of the two wills were the two brothers J. B. Joel and Solomon Joel, the sole partners in the firm of Barnato Bros. and the residuary legatees. When the appellant became absolutely entitled they purported to account to him for all that was due to him, and paid him approximately £712,000. He executed a release subject to errors being discovered. A minor error was discovered, and in 1918 he issued a writ claiming an account. An accountant was appointed, and his investigations revealed serious omissions and errors in the account which the trustees had rendered to the appellant. Among other matters, the whole of the diamond business of Barnato Bros. had been entirely omitted from the account; investments had been transferred to the appellant at overvaluation and to the trustees at undervaluation. In 1923 the statement of claim was amended making a series of charges against the trustees and claiming larger sums, but not alleging breach of trust or fraud. In 1925 ROMER, J. (as he then was), made an order by consent of the parties in which it was admitted, *inter alia*, that the trustees were to be chargeable at $4\frac{1}{2}$ per cent. compound interest with yearly rests on all moneys found due to the appellant from time to time until payment. The matter was then referred for special investigation to accountants nominated by both sides, and later to a special referee. The accountants were not able to discover the amount of the principal which ought to have been paid in 1917, because the necessary information was not available, but drew up a detailed statement (exhibit D).

The trustees paid sums of £200,000 and £350,000 on account, and finally, by agreement, a final single capital sum of £327,250 was paid; releases were executed and the matter was closed.

The special referee, in settling the agreement, prepared a computation (exhibit F) in conjunction with the accountants of both parties, and found that the balance due to the respondent was £327,254. This computation took as a starting-point the figure of £540,722. This sum and the balance due were arrived at after taking into account compound

interest on the various items, and, in accordance with the order of ROMER, J., interest was computed at $4\frac{1}{2}$ per cent. except for two months at the end of the period. The net amount of the interest shown by the accountants' statement was £433,059, and the commissioners of inland revenue sought to assess this figure to super-tax.

Capt. Woolf Barnato appealed to the special commissioners, who heard the case on Feb. 15 and June 1, 1933. They found that the three sums paid to Capt. Woolf Barnato were capital and therefore not subject to assessment. The commissioners of inland revenue appealed, and the special commissioners for income tax stated a case for the court. In setting out their finding they said :

Broadly speaking the statement of claim alleged various breaches of trust by the defendants extending over a long period. . . .

6. In our opinion it is not possible to differentiate between the sums of £200,000, £350,000, and £327,250. As regards the last sum it is described in the award as a single capital sum, and we hold that the same designation must be attached to the earlier sums of £200,000 and £350,000.

7. Having heard the evidence of Mr. Allan, the chartered accountant who acted for Capt. Barnato throughout the proceedings and during the negotiations for settlement, and having regard to the nature of the appellant's claim, we consider that that portion of the total sums paid to the appellant, which was calculated on an interest basis was interest in the nature of damages or compensation and not interest within the meaning of the Income Tax Acts. (See *Re National Bank of Wales* (2), per WRIGHT, J.)

8. We therefore hold that the appellant is not assessable to super-tax in respect of any portion of the said sums and we discharge the assessments.

On Dec. 7, 1934, SINGLETON, J., who heard the appeal, gave judgment in favour of the commissioners of inland revenue, reversing the special commissioners for income tax. It was argued that the latter part of the commissioners' finding was a finding of fact. The learned judge would not regard it as a finding of fact, but rather as the commissioners' view of the position in law. He remarked that on the face of the award there was nothing to show that interest was included at all, but the actual wording of the award did not decide the matter and regard must be had to the substance. He considered that the award included sums which were clearly interest. He was influenced by the defendants' admission in the order of ROMER, J., that compound interest at $4\frac{1}{2}$ per cent. should be paid to Capt. Woolf Barnato ; and by the fact that the ultimate figure embraced in the award was based on the figure of £540,722, which itself included the interest amounts. He did not regard the interest as damages in the sense of *Re National Bank of Wales* (2). Finding that the sums paid to Capt. Woolf Barnato included amounts of interest, he allowed the appeal and ordered the case to go back to the commissioners for ascertainment of the correct amounts.

Capt. Woolf Barnato appealed

A. M. Latter, K.C., Sir William Jowitt, K.C., L. W. Byrne and C. L. King for the appellant.

The Attorney-General (Sir Donald Somervell, K.C.), Fergus D. Morton, K.C., and R. P. Hills for the respondents.

Latter, K.C.: The special commissioners found as a fact that these sums were all capital. Unless a sum of principal ascertained and due is found, and a sum which exceeds that sum has been paid in addition, no question of interest can arise. Whether there is interest is a matter of fact. The tribunal of fact have not disintegrated the interest from the capital, and were not compelled to do so. Even assuming that it is necessary to disintegrate a sum representing compound interest at $4\frac{1}{2}$ per cent., this sum is not interest within the meaning of the Income Tax Acts; it is damages or compensation—the equitable equivalent of damages for the trustees' wrong-doing in the matter. The distinction was clearly drawn in *Re National Bank of Wales* (2), where a misfeasant director was not allowed to deduct income tax from a sum of interest which he was ordered to pay to the liquidator. If there is a properly constituted trust fund, the liquidator may be assessed to income tax on the actual interest, dividends, and other accretions to the fund. Here there was no such fund, and the income was that of a trustee who was not performing his duty. There could have been no other income unless it was constituted by a contract. Income due under a contract as an annual payment is assessed under sched. D, case III, rule 1 (a), but here there was no contract between the defaulting trustees and the appellant.

The learned judge was wrong in dealing with questions of fact which the special commissioners had already determined. Income tax cannot be assessed on calculations made for the purposes of compromise and not as definitive figures. It is convenient to describe as interest for the purposes of calculation sums which are not really interest at all. The mere description by the accountants of an addition to a principal sum as representing compound interest is not sufficient evidence that it was really interest. When there is a claim for principal and interest, until the principal has been repaid there can be no interest. There was no agreement of a capital sum. [He referred to *Vyse v. Foster* (1); *Re Lands Allotment Co.* (3); *Simpson v. Maurice's Executors* (5); and distinguished *Schulze v. Bensted* (4) and *Sweet v. Henderson* (7)].

Sir William Jowitt, K.C., followed, and cited *Smith v. Law Guarantee & Trust Society, Ltd.* (8).

The Attorney-General: The order of ROMER, J., records an admission by the defendants that they are chargeable with compound interest at $4\frac{1}{2}$ per cent. on a yearly basis. There was no dispute between the parties as to the rate of interest, nor as to the date from which the

interest should run ; the only dispute was as to the principal sum. A final sum has been paid ; it is now only a matter of calculation to disintegrate the interest. The parties could not have evaded income tax if they had destroyed the document embodying the calculations for their settlement, or had agreed that the sum should be called a lump sum none of which was interest. The accountants in their report set out the capital and interest figures and differentiated between them. This was a finding of fact, and the opinion of the commissioners was the only ground on which it could be suggested that it was not a finding of fact. This court is not bound by the names which the commissioners choose to give to various sums ; it may investigate the facts irrespective of the finding of the commissioners : *Gliksten's* case (9). In *Re National Bank of Wales* (2) there was misfeasance by a director and a finding of fraud or of acts which carried the legal consequences of fraud ; the learned judge awarded a sum as damages calculated on an interest basis. In the present case the interest was not awarded as damages but was paid under an agreement between the parties. Interest is always compensation, but need not necessarily be damages. The chargeability to interest agreed and admitted in the order of ROMER, J., applies equally whether the defendants are regarded as trustees in possession of trust property accounting to their beneficiary, or as partners paying out to a retiring partner his share of the partnership assets. The principles on which trustees are ordered to pay interest are correctly set out in *Vyse v. Foster* (1). In *Simpson's* case (5) compensation was awarded for loss of interest on a security remaining in German hands during the War ; that compensation was not interest. Here, the interest was not interest in the nature of compensation or damages. Even if these amounts are not assessable under sched. D, case III, they are clearly assessable under case VI, which provides for the taxation of annual profits or gains not covered by any of the foregoing cases or schedules. It was held in *Smith v. Smith* (6) that income tax could be deducted from a personal allowance made by a husband to his wife under an order of the court, and LORD STERNDALÉ, M.R., there said that the words of case III, rule 1 (a) were not to be taken as excluding all payments that could not be brought within them. The words are illustrative and not exhaustive.

Fergus Morton, K.C., following on the same side : This is not an action in which a beneficiary is claiming damages for a breach of trust ; he is claiming an account and the benefit of what is found due on that account. Capt. Woolf Barnato agrees by a contract to take $4\frac{1}{2}$ per cent. compound interest. Throughout all the negotiations there is never any conflict on anything else but the capital figure on which interest is to be calculated. The payment here is a *surrogatum* (*Schulze v. Bensted* (4)), a substitution of one piece of property by another under

such circumstances that the thing substituted retains the same legal characteristics as the thing for which it is substituted.

Latter, K.C., in reply.

LORD WRIGHT, M.R. : This is an appeal in a revenue matter from a decision of SINGLETON, J., sitting as a revenue judge, in which he has decided contrary to the ruling of the commissioners in a case which they stated. The matter is one of a little complication, and I think I may shortly indicate its nature before I examine the details with any particularity.

The assessments which were made and which have been set aside by the commissioners were, first, in a sum of £200,000 for the year ending Apr. 5, 1926 ; the assessments were for super-tax, and the date of the payment in question, therefore, was before Apr., 1925. The second was an assessment in the sum of £350,000 for the year ending Apr. 5, 1928 ; payment was made in the tax year of 1926/27. The third was an assessment in the sum of £329,000 for the year ending Apr. 5, 1929, and the money was received in Apr., 1927, and Apr., 1928. The question involved is whether these three sums which have been assessed to super-tax contain interest in them assessable as interest or income to income tax, and in order to decide that question it is necessary to consider very carefully the precise findings in the case by the special commissioners, and if they are, as I think they are, findings of fact that the sums assessed did contain moneys which could be described, in one sense, as interest, then the question has to be determined—and that is the question on which, I think, the special commissioners arrived at their decision—whether these interest sums (if I may use the term neutrally for the moment) were sums of interest within the meaning of the Income Tax Acts. The special commissioners have decided that they are not, and that is the question of law which is stated in the case as I read it. There has been some discussion as to what the findings of fact of the commissioners were, and I shall deal with that discussion in due course.

There is still a further question raised, and that is, assuming that the commissioners were wrong and that the learned judge was right in holding that, as a matter of law, these particular sums to which I have referred did contain sums of interest, then it is said on behalf of the appellant here that such sums, even though interest, do not come within the taxing sections of the Income Tax Acts. That is a further matter with which I shall have to deal.

The moneys in question were paid as by way of discharge of a certain interest which the present appellant, whom I shall describe hereafter as Capt. Woolf Barnato, had in the partnership and in the assets of the firm of Barnato Brothers. He took that interest under the will of his father, Barnett Isaacs Barnato, dated Feb. 21, 1896, and he took a further

interest of a similar character under the will of his uncle, Woolf Joel, who made a will dated Jan. 14, 1898. The father died on June 14, 1897, when Capt. Woolf Barnato was, I think, two years old, and Mr. Woolf Joel died on Nov. 30, 1908. Capt. Woolf Barnato was at both these dates still a minor, he not attaining his majority until Nov. 27, 1916. On Feb. 12, 1917, he was made a partner in the firm, but that was merely to satisfy certain terms of the will, and his partnership came to an end on Feb. 28, 1917. It seems sufficiently clear that the strict accounting date would be the date at which Capt. Woolf Barnato, as beneficiary, achieved a vested interest—that is to say, at the date of his majority; but throughout in these proceedings the material date for the accounting has been taken as Feb. 28, 1917, and before us it was agreed that that date should still be adhered to.

The first question, therefore, which had to be ascertained was the value of the interest which vested in Capt. Woolf Barnato at this date. There was very great difficulty in ascertaining that, for reasons which I shall explain in a moment, and the result was that a final settlement was not arrived at until the date of an award by consent, on Apr. 12, 1927. The issue in the present case is this. Assume that the amount of Capt. Woolf Barnato's interest as at the material date is ascertained, and assume that in addition to that amount he had coming to him various sums in respect of the profits or interest or income in the intervening period of ten years: ought that to be treated as of the nature, as it is said, of capital or damages, or ought it to be treated as interest in the ordinary sense of the term—namely, moneys payable to the appellant in respect of the period of time during which his debtors, the two partners, had the benefit of the money which was due in fact in 1917? For this purpose it does not appear to me to be material to determine whether the rights of Capt. Woolf Barnato at the material date are treated as rights attaching to him as a partner—because he was a partner, as I have said, for a short period—or whether they are to be treated as attaching to him as a *cestui que trust* under the settlement in the wills to which I shall refer in a moment. If the moneys were treated on the basis that he was entitled as a retiring partner, then the matter would fall under the Partnership Act, 1890, s. 42 (1), which provides that:

In the absence of any agreement to the contrary, the outgoing partner or his estate is entitled at the option of himself or his representatives to such share of the profits made since the dissolution as the court may find to be attributable to the use of his share of the partnership assets, or to interest at the rate of 5 per cent. per annum on the amount of his share of the partnership assets.

And a similar rule applies in the case of a trust. I need not refer, perhaps, to authority, but I shall just mention the case of *Vyse v. Foster* (1), and to the statement made in that case by JAMES, L.J., at p. 333:

This court is not a court of penal jurisdiction. It compels restitution of property unconscientiously withheld ; it gives full compensation for any loss or damage through failure of some equitable duty ; but it has no power of punishing any one. In fact, it is not by way of punishment that the court ever charges a trustee with more than he actually received, or ought to have received, and the appropriate interest thereon.

I need not read the rest.

That being the general nature of the case, I must refer to the facts in some little detail—facts which are not in dispute, I think—before I come to read the case upon which the decision in this appeal must turn. The executors of the wills, almost from the beginning, were the defendants in the action, to which I shall refer in a moment, and throughout, with the exception of an early period, they were the sole partners in the firm of Barnato Brothers. They were Mr. Jack Joel and Mr. Solomon Joel ; they were the executors and trustees under the wills. I need only refer to the will very shortly in each case. Each will was, for this purpose, in the same terms, but for material purposes its effect was this. The testator left Capt. Woolf Barnato £250,000, together with such proportion of the profits arising from that share and interest in the firm and its investments and assets and property as was properly applicable to the said sum of £250,000, and in respect of any such proportionate profits as should accrue during the minority of his said son the same should from time to time be invested by the trustees, together with all accumulations, and the produce thereof should, on his said son—there was also another son and daughter, but I am limiting myself to what is material—attaining the age of 21, be added to the said sum of £250,000 so that the share and interest of the son in the said firm and its investments and assets and property should be the aggregate amount of the sum of £250,000, and the said accumulated profits and produce thereof and his share of profit should be on such aggregate sum.

That gives, then, the problem which had to be determined upon the son attaining the age of 21—namely, that he should have allotted to him or paid to him the capital sum so ascertained. As I have said, Capt. Woolf Barnato attained the age of 21 on Sept. 27, 1916, and, as I have said, he became a partner in the firm for a brief period, from Feb. 12, 1917, until Feb. 28, 1917. That was done in accordance with a further term in the will which directed the surviving partners, within one year, to decide whether or not they would admit the son upon his attaining 21 to become a partner, and it left that option to be exercised upon such terms and conditions as to the partnership as the partners should think fit. That was done. The partnership having ended on Feb. 28, 1917, Capt. Woolf Barnato executed a release to the two partners, executors and trustees. It was known at that time that accounts had not been rendered of his interest under the wills, but a certain sum was

accepted by way of satisfaction, subject, however, to the important condition that accounts should be handed to the beneficiary as soon as practicable after the signing of the release, and if any error in such accounts should manifestly appear exceeding the sum of £500, the trustees should rectify the same. That was the condition under which the money and assets were received, and the release was executed. Under that release Capt. Woolf Barnato obtained £245,000 in cash almost at once. There were certain provisions which were not precisely followed, but he received that sum of money very shortly after the release was executed, and he also had transferred to him securities amounting in value to about £417,793. As I have said, no accounts had been rendered at that time, and it appeared that no separate accounts of the trust had been kept and the books were difficult to understand. I am here and throughout using the word "trust" as applying to the interest due under both the wills, because no distinction has been made, except necessary distinctions, in this respect. It is treated as a trust from the appropriate date, in all, of £500,000 and the accumulations and accretions. In the result it became quite clear that there had been very serious errors and omissions in the accounts upon which the release had been provisionally executed and the various payments and transfers accepted.

Thereupon, on Nov. 1, 1918, Capt. Woolf Barnato issued a writ against the two trustees—because they are now treated throughout as trustees, and I shall call them trustees in future—asking, in effect, for accounts. The three matters claimed on the writ are :

- (1) An account of all dealings and transactions as from June 14, 1897, of the partnership formerly carried on under the firm or style of Barnato Brothers and referred to in an indenture dated Feb. 28, 1917.
- (2) An inquiry of what the credits, property and effects of the said partnership consisted as on Feb. 28, 1917.
- (3) To have the share of the plaintiff in such credits, property and effects ascertained.

The indenture of Feb. 28, 1917, was the release, and that day was taken as the correct date. Very elaborate pleadings were delivered, and I may observe that, although the claim was in respect of a partnership, it has, as I have said, been treated throughout on the basis of a trusteeship. The pleadings are voluminous, but the essential claim is that :

The plaintiff was entitled to two several sums of £250,000 each charged on the shares and interests of those testators respectively in the business of the firm of Barnato Brothers and to a share of the annual profits of the said business bearing the same proportion to the share of profits coming to the estates of the testators respectively as the said sums of £250,000 together with the accumulated profits for the time being accrued thereon bore to the share for the time being of the estate of each of the said testators in the capital of the business.

The action went on, and in the course of the action it appeared that, in addition to the various matters of general accounting which were complained of, the diamond business in which the partnership

had been interested had been entirely omitted from the accounts, and a claim in respect of that was added later by amendment. On May 5, 1924, directions were given as to the issues to be determined on the account or inquiry, and the first was the construction of the wills, including various questions which had been raised—questions mainly as to a failure to attribute the proper accretions ; and, secondly, an issue as to the diamond business, whether or not it was any part of the business of the firm ; and, thirdly, special reference to certain particular investments, assets and property dealt with in para. 22 of the statement of claim, certain shares which the partners claimed to have withdrawn on a certain value. These were the main issues which were then directed to be tried.

Then the action came on before ROMER, J., as he then was, on May 20, 1925, and he made an order. I may say that by that time, so clear had it been that the original settlement was inadequate, that the first of the sums here in question, £200,000, had been paid to Capt. Woolf Barnato on Apr. 1, 1925, generally on account. Then, as I have said, came the order of ROMER, J. That order proceeded, first of all, upon certain admissions, nine in number, made by the defendants in that action, admissions which showed that there were very substantial sums by way of accretions to be brought into account, and admissions agreeing that the diamond business at Kimberley and an interest which they had in a diamond business in London should be brought into account, and various other matters which I need not here detail. But there is one paragraph of the admissions which I think I ought to read in full, and that is admission No. 9. That was :

That the defendants are chargeable with compound interest at $4\frac{1}{2}$ per cent. per annum with yearly rests on all and any moneys found due to the plaintiff from time to time until payment (the plaintiff accepting the same in lieu of annual profits thereon) provided that interest shall not commence to run until Dec. 31, 1913, upon sums which are to be treated as accretions to capital (increasing with each such accretion the plaintiff's proportion of subsequent profits) under para. 1 of these admissions.

That latter point of detail is not material here to consider. What is material is that it was admitted—no doubt owing to a great delay in obtaining proper accounts, because there we are in May, 1925, and the accounting date had been Feb., 1917—that compound interest was to be charged at $4\frac{1}{2}$ per cent. per annum and that was to be accepted in lieu of annual profits. That admission did not in terms draw a distinction between the interest accruing due before the accounting date and interest accruing due after the accounting date. As we shall see, the bulk of the interest accounted for under that admission was so accounted for in respect of a period after Feb. 1917. But the admission was general, and although I have not investigated the matter with any minuteness,

I think it is clear that some interest under that admission was charged in respect of the period before Feb., 1917. I merely mention that to draw the distinction, because it is clear that any interest charged up to the date of Feb., 1917, would go to swell the capital sum which had then to be ascertained, and so far as the present case is concerned all that matters is the interest which accrued under admission 9 after the capital sum fell due and until the precise amount was ascertained.

These being the admissions, an order was then made directing accounts and inquiries to be taken and referred to a special referee, who was in fact afterwards decided to be Mr. Harold Brown. The inquiry was, first of all, as to the capital of the firm and of the plaintiff existing on the following dates, namely :

1. . . . at the dates of the deaths of the said testators respectively and at the end of each subsequent financial year down to and including Dec. 31, and to whom and in what proportions such capital belonged on each of the said dates,

and an account of all dealings and transactions as from June 30, 1897, to Dec. 31, 1913, and particular reference is made to the diamond business. Then, thirdly :

3. An inquiry what sum is due to the plaintiff on the footing of this judgment in respect of his share in the capital and in the profits of the said firm as from time to time constituted at each of the above-mentioned dates and how each such sum and the amounts from time to time representing the same have been applied or dealt with and in particular whether and to what extent such amounts were retained in the said business or whether they were invested and if so in what manner . . .

and so forth. Then there are various other detailed directions with which I need not deal ; and it was further ordered that the special referee was not to proceed with the accounts and inquiries :

unless and until the plaintiff or the defendants shall give him not less than seven days' notice in writing requiring him so to proceed, the defendants and the plaintiff by their counsel undertaking so far as they are reasonably able so to provide that in the meantime David Howat Allan of the firm of Allan Charlesworth and Company and James Napier of the firm of Kemp Chatteris Nicholls and Company, acting in their capacity of accountants for the parties respectively but not as arbitrators, shall personally or by their representatives work upon the said accounts and inquiries continuously with a view to eliminating all matters upon which they can agree and with power for them jointly to certify from time to time any matter relevant to any account or inquiry hereinbefore directed (including a complete answer to any such account or inquiry if they are agreed thereon) and with power so to certify any matters either absolutely or subject to the reservation of any points whether of principle or detail for the consideration of the special referee and any such certificate of the said accountants is to be binding on the parties and any such reserved points are to be defined by the said accountants with a view to their being submitted with as little delay as possible to the special referee for decision.

That was the order of the learned judge (as he then was), and I may point out at once that neither in the pleadings, nor in the order directing

the issues, nor in the judgment of the learned judge, was there any charge of fraud made against the defendants ; the matter was put throughout as a matter of accounting.

That being the order made, the next matter to which I must refer is an elaborate document prepared by the two accountants in their endeavour to limit the area of dispute and to agree as far as they could. That was dated Dec. 17, 1925. It refers to the learned judge's order, and says :

we have so applied ourselves and having respectively obtained authority in relation to compromises of certain matters where full facts were not obtainable, we certify that the only points reserved for the decision of the special referee are:—(1) Whether there were any, and if so, what transactions falling under para. 3 of the admissions in the said minutes which are not disclosed by Barnato Bros. firm's ledgers,

and so on. These are relating to the diamond transactions. Then, secondly,

What valuation should be placed as at Dec. 31, 1913, on the securities held by the firm on that date as shown in its balance sheet under the following headings

—London and Johannesburg—

and on the 175,000 ordinary shares of

a mining company. These were the two matters which were specifically referred to the special referee ; that is to say, the two questions as to diamond transactions and the proper valuation which attached to various shares. I ought to observe that the plaintiff firm were to a very large extent carrying on a business of investment, and part of their operations and assets consisted of investments. They were to that extent a holding firm as well as an operating firm.

That was the introduction, stating the two points. The accountants summarise the position ; they append a summary of the entire account between the defendants and the plaintiff, and they divide it into certain periods. The first period is from June 30, 1897, to Dec. 31, 1913 ; the second period is from that date to Feb. 28, 1917, and I do not intend to refer to that in detail, because what is specially material here is the position as at Feb. 28, 1917, when the capital interest of Capt. Woolf Barnato had to be ascertained. When one comes to this account and looks at it in that respect, one sees that the plaintiff and the defendants were at variance to a certain extent. No doubt a very great number of matters had been settled and were not the subject of debate, but there were certain outstanding matters which made a difference between the two valuations of the two accountants of about £200,000. So that you had two parallel sets of figures : on the one hand, you had the plaintiff's valuation of the position as at Feb. 28, 1917, which was £1,038,317,

and you had the defendants' valuation, which was £808,858. Then to that was added compound interest at $4\frac{1}{2}$ per cent. on each of the immediately foregoing amounts; that is, up to Dec. 31, 1918. That gave another figure when the addition was made. Then various matters had to be brought into consideration, and that gave a figure due to the plaintiff in the defendants' hands as at Dec. 31, 1918, which was put, according to the plaintiff's valuation, at £797,139, and according to the defendants' valuation at £548,308; then on those figures interest was added at $4\frac{1}{2}$ per cent. up to Dec. 31, 1925—that is, just before the date when this report and certificate were given, and that interest amounted to £287,656 on the plaintiff's valuation and £197,862 on the defendants' valuation. That gave two figures: the plaintiff's valuation £1,084,795, and the defendants' valuation, £746,170. Then a deduction was made for the payment of £200,000, to which I have already referred, and that left the two final figures as at Dec. 31, 1925, on the plaintiff's valuation £879,347, and on the defendants' valuation £540,722, to which amount the accountants add, "Is subject to alteration when the reserved points shall have been decided."

That left, as I have said, the two reserved points. They came before the special referee, and after a hearing lasting two or three days the two accountants agreed on a figure and that was embodied in the special referee's award which, as I have said, was dated Apr. 12, 1927. That award ordered that the defendants should make to the plaintiff payment of a single capital sum of £327,250, to be paid at certain periods with interest at 5 per cent.; that is to say, the ordinary interest payable on a judgment was to run as soon as the final amount was ascertained. Before that award was made the defendants had paid the plaintiff a further sum of £350,000, which is the second of the sums on which the assessment is made. That, like the previous payment of £200,000, was made generally on account. There are orders as to costs.

Now, the question is on what footing were these payments made, and that is really the question in the case. It is said, on the one hand, that they were made generally on account and as capital sums without any allocation or appropriation as between capital and interest. On the other hand, it is said on behalf of Capt. Woolf Barnato that that is not so, that the sums arrived at and represented by these payments were composite sums consisting of, first, the exact and precise amount, no doubt only ascertained after an interval, but, in fact, always ascertainable, of the plaintiff's rights as at Feb., 1917, and that all the residue of those moneys consisted of interest, and not only was that said generally, but the parties had appropriated the moneys dealt with in this way as being capital and interest with the greatest care and particularity from beginning to end. I have already referred to the accountants' certificate, which was called exhibit "D," and that takes the matter up to Dec.,

1935. But the final account represented by the sum of £327,000 was equally particularised and disintegrated by another exhibit "F," which the special commissioners have appended to the case. I must now refer in a little detail to this exhibit "F." The accountants, as it seems, began by taking as their initial figure up to that date the sum of £540,722, which, as I have explained, was the defendants' valuation. So that, for whatever reason nobody knows now, the plaintiff and his accountant and advisers were prepared to accept as a true figure the defendants' valuation, and this is how it is described in exhibit "F":

Balance due to plaintiff on defendants' basis as shown by accountants' certificate, which includes interest to Dec. 31, 1925.

Then come amounts which are to be added in respect of the diamond business and that is dealt with in this way: "Amount to be charged to defendants as at Jan. 31, 1902," which works out at £11,287, and then "Compound interest from Jan. 31, 1902, to Dec. 31, 1925," and that works out at £21,059. Of course, only a proportion of that would be interest in respect of the period after Feb., 1917, though it all fell within admission 9. Then there is a similar amount to be charged to the defendants as at June 30, 1911, of which the plaintiff's proportion came to £1,384, and compound interest from June 30, 1911, to Dec. 31, 1925, £1,236, making a total of £2,620. Then there was "Undervaluation." That was a substantial item. It arose mainly in connection with a block of shares to which I have already referred. And it was said that the defendants in withdrawing them had undervalued them, and the dispute was as to the proper value. There was some compromise there which resulted in an increase in the value of the investments; that is to say, the defendants were treated as having withdrawn them at an undervaluation, an increase of £547,194, of which the plaintiff's proportion came to £46,308, and to that was added compound interest from Dec. 31, 1913, to Dec. 31, 1925, £32,225, making altogether £78,533. Then a figure of £654,221 was arrived at by adding these sums to the £540,000 odd, and that was put as the balance due to the plaintiff as at Dec. 31, 1925. That is to say, it amended the accountants' certificate in two ways, first, by taking the defendants' valuation, and, secondly, by adding the diamond business and the claim in respect of undervaluation. On that balance there was added interest from Dec. 31, 1925, to Feb. 15, 1927, £33,317, at $4\frac{1}{2}$ per cent.; and then further interest up to the date of the award, Apr. 12, 1927, which was put at $5\frac{1}{2}$ per cent. There were certain deductions, in particular the second of the payments to which I have already referred, of £350,000, on Apr. 21, 1926, to be deducted, and an allowance of interest was also to be made irrespective of this payment. That left a total final figure of £327,254, which was duly paid under the award of Mr. Harold Brown.

It is necessary now to refer in detail to the case. I think I have so far accurately stated the various matters which are set out in the case, but it is necessary to see how the special commissioners deal with these matters. I think I must read several clauses of the award in order to see how the matter stands. In clause 28 the special commissioners refer to the evidence of Mr. Allan, the chartered accountant, and they set that evidence out, I suppose, as uncontradicted evidence, and I think it is not wrong to treat it as part of their findings of fact or their detailed findings. In particular they say his evidence was that the final settlement before the special referee was the result of a compromise.

(g) For the purpose of arriving at the correct figure to be inserted in the arbitrators' award and to see how much was due to the respondent under the terms of the final settlement he prepared.

The accountants on the other side prepared a computation, and that is the computation contained in exhibit "F," to which I have already referred, and I will not repeat it. It is exhibited in the case. His evidence was, according to the case, that the said sum of £540,722 and the said balance of £327,254, to which reference is made in the exhibits "D" and "F," "were arrived at after taking into account compound interest on the various items referred to in the said report, and computation in accordance with the order to that effect of ROMER, J.," which is exhibited as exhibit "C." Interest was computed at $4\frac{1}{2}$ per cent. except for the last period, when 5 per cent. is adopted. Then it is added, "There was never any final definite figure settled until the figure of £327,250 was agreed to be included in the said award." Then the case goes on,

29 . . . the total amount of the interest shown by the accountants' statement was £474,940 (including interest at 5 per cent. from April 12 to June 23, 1927), less £40,406 interest allowed in respect of payments made prior to April 12, 1927, equals £434,534.

Then there are certain minor adjustments and then the case states that the total amounts paid might be dissected into £433,059 interest, and balance representing capital and profit, £444,191.

I stop there for a moment to observe that it is not quite clear whether the statement there made is simply made as a statement of what appears in account "G" put in by the Crown for the commissioners, or whether it states the special commissioners' own view. I am prepared to treat it as the former, merely as a matter of statement at this stage; but I must point out that account "G" is in truth what it is stated to be in the case, namely, simply a summarised statement of what is shown in the reports. Now the case proceeds (and these are the material matters):

30. The assessments under appeal were made upon the respondent on the basis that part of the said sums paid to the respondent as hereinbefore set out namely

£433,059 represent interest in respect of which the respondent is liable to be assessed to super-tax.

I may stop here to observe that, for reasons which will appear in a moment, the commissioners did not think it necessary to separate out the interest which would be properly assessable to income tax if any were assessable. Then the case sets out the contentions :

31. It was contended on behalf of the respondent that : (a) No part of the said sums of £200,000, £350,000 and £327,250 represent interest in respect of which the respondent is assessable to super-tax.

It is not very clear whether that means it does not represent any interest at all or whether it means it does represent interest but not interest for which the respondent is assessable to super-tax—" (b) The assessments should be discharged." Then the Crown's contentions were :

(a) Of the sums paid to the respondent that part which represented compound interest, namely £433,059 was interest in respect of which the respondent was assessable to super-tax. (b) That the said interest was income of the years in which it was received by the respondent. (c) The assessments were correct in principle.

That raises a point which may have to be investigated some day, namely, whether these sums being in part assessed to income tax, are only assessable in respect of such amounts as were actually paid by way of interest for the year of assessment, paid as assessable in respect of amounts actually paid in the year of assessment—that is to say, the total amount with reference to interest, or whether the proper computation is limited to that part of those sums which accrued during the year of assessment. The commissioners, as we shall see in a moment, did not deal with that matter.

Then in clause 33 the commissioners proceed to give their conclusions. I need not repeat now the first four conclusions, I will commence at conclusion 5 :

5. By his said award dated Apr. 12, 1927, Mr. Brown by consent ordered that the defendants in the action should pay to the appellant a single capital sum of £327,250.

6. In our opinion it is not possible to differentiate between the sums of £200,000, £350,000 and £327,250. As regards the last sum it is described in the award as a single capital sum, and we hold that the same designation must be attached to the earlier sums of £200,000 and £350,000.

Then the case proceeds, and this paragraph and the following paragraph I think are the vital paragraphs :

7. Having heard the evidence of Mr. Allan, the chartered accountant who acted for Capt. Barnato throughout the proceedings and during the negotiations for settlement, and having regard to the nature of the appellant's claim we consider that that portion of the total sums paid to the appellant, which was calculated on an interest basis, was interest in the nature of damages or compensation and not interest within the meaning of the Income Tax Acts. (See *In Re National Bank of Wales* (2), per WRIGHT, J.).

8. We therefore hold that the appellant is not assessable to super-tax in respect of any portion of the said sums and we discharge the assessments.

Taking clauses 7 and 8, and disregarding for the moment clause 6, I construe these clauses to mean this : that the commissioners are finding as a fact that there was an appropriation or allocation of the total amounts paid, as to part to interest, or something in the nature of interest, or calculated on an interest basis ; that that was severable and a separate figure which in fact can be disintegrated ; but that though it may be described as a sum calculated on an interest basis, it was interest in the nature of damages or compensation and not interest within the meaning of the Income Tax Acts, and accordingly, on that view of the law, starting with that view of the facts they hold that the appellant is not assessable to super-tax.

It is said that that is a correct conclusion in law. It is also said that if reference is made to clauses 5 and 6 of these conclusions it appears that the commissioners were only treating the question of interest as a matter of alternative, and were in the first instance proceeding on the basis that there was no differentiation or allocation at all of the three sums paid which were said to be paid as single capital sums, and accordingly it is contended that when the commissioners say, "We therefore hold," they are arriving at a conclusion on both alternatives and not merely on the alternative of their being interest—which, however, is not, as a matter of law, income tax interest. I do not think that that is a true reading of the case. It is perfectly correct to say that the sum paid under Mr. Harold Brown's award was specified as being a single capital sum, and that no distinction can be properly drawn between that and the two other payments ; but it is perfectly clear, I think, that a mere matter of words cannot decide a question of this character. I think that all Mr. Harold Brown meant when he said that £327,000 was paid as a single capital sum was that it was in fact so paid. He was referring to the manner of payment and not to its character, in the sense that it had been the subject of no appropriation, so that the taxpayer was entitled to appropriate it as would suit him better—that is to say, that he could appropriate it all to capital and say that there was no interest in it at all.

I do not think that that is what is meant by the commissioners, and I think that if they had meant that they would have said so in clear and precise terms. I think they are reciting here, first of all, the expression, the designation under which the final payment was made, and saying that the same designation would apply to the two earlier payments, and then they are proceeding to deal with the payment as on a question of fact in accordance with all the matters which they have already set out as matters of fact in the case. Therefore I do not think they are dealing with this matter as a matter of alternative. In

a sense, of course, they would say, having regard to the conclusion at which they arrived on the question of law, that the single lump sum payments were not really capable of any differentiation for any relevant purpose; they were all in the nature of compensation for the failure to account, and I think it may be in that sense that they are adopting the expression, which they take from the award, that the payment was a single capital sum, but I think they are only doing so in virtue of the conclusion of law at which they arrive.

To support that view as to what the commissioners intended to find, I must again refer to the evidence of Mr. Allan, which they have set out, and to the exhibits "D" and "F" which they have also set out, which clearly and beyond any possibility of contradiction show that the moneys paid which are the subject of these proceedings contained interest in one sense, whether it was interest which fell to be taxed or not.

That leaves me now to consider the question of law, which indeed is simply whether the decision of WRIGHT, J., in *Re National Bank of Wales* (2) applies to this case. In my opinion it does not, and therefore I do not think it necessary and do not desire to express any concluded opinion upon whether it is rightly decided or not. The distinction between that case and this is simply that in that case the learned judge was proceeding on the basis that the trustee against whom he made his order was fraudulent. His judgment is very short, and it is worth reading in full, I think. At p. 650 he says this:

In *Re J. W. Hobbs & Co.* (3) the question whether income tax could be deducted never came before me. I did not see my way to allowing Mr. Cory to deduct the amount of income tax from the penal interest of 5 per cent. It is not a question of contract at all, so far as I can see.

In the present case, of course, the interest was payable under an order of the court, or, rather, under a consent or a contract embodied in an order of the court. However, there WRIGHT, J., said at p. 651:

It is not a question of contract at all, so far as I can see. The matter must be regarded for this purpose as if the respondent had fraudulently given away £37,000 of the capital of the company. I ordered him, rightly or wrongly, to repay that sum, and I make an order the effect of which is to find that the company has by its capital being withheld all these years suffered damages equal to 5 per cent. per annum. If the company has suffered these damages, I can see no reason why it should not get the whole of the damages back. It is called "interest," but it is really damages for withholding its capital from the company. I have tried to find some authorities on the question, but I am unable to find any.

When that case went to the Court of Appeal, it was not necessary to examine the correctness of the ruling of WRIGHT, J., because the Court of Appeal set aside his order *in toto*; they held that he had proceeded upon the conclusion that the director "was not only negligent but

fraudulent ; or, at all events, guilty of misconduct equivalent to fraud as regards its legal consequences." Then the Court of Appeal say :

We are quite unable to adopt the view of WRIGHT, J.—that Mr. John Cory acted fraudulently in making reports to the shareholders and laying the balance sheets before them.

So that that stands as an order made in that way, and, under those special circumstances, on the view that the delinquent party had been guilty of fraud, and that there was no interest due under any contract, and that the amount which was awarded was not interest but damages for withholding the capital from the company.

The learned judge refers to a case of *Hobbs*, which is really the *Lands Allotment Company* (3). The report in the Law Reports, so far as I have observed, does not refer to the question of interest at all on the amounts awarded, but it was simply a case of a trustee not having properly accounted. The trustee was responsible for a breach of trust, but not for a fraudulent breach of trust. My learned brother, ROMER, L.J., has, however, referred me to the order actually made in that case, which is to be found in PALMER'S COMPANY PRECEDENTS, 7th Edn., part II, p. 549, form 635A, which shows that the order was :

H. is liable to contribute to the assets of the company the sum of—pounds . . . with interest thereon at the rate of 4 per cent. per annum,

and interest on a further sum ; and then the order proceeds to say that the order is for the payment less income tax in each case. That was the order of WRIGHT, J., in 1893.

I must also refer to a decision of the Court of Session in Scotland in *Schulze v. Bensted* (4), which proceeds on the same basis. The appellant was the trustee of the deceased's estate, and he was bringing an action to recover from the defendant an asset of the trust estate which, owing to the negligence of the defendant's representative, who had been at the time a trustee of the person represented by the plaintiff, had not been ingathered, and it was there held that the money so recovered, the interest on the money withheld, was subject to tax. The appellant, according to the LORD PRESIDENT, had received the sum of £462 in the name of interest :

If the sum so received was interest in reality as well as in name, then, no income tax having been paid thereon, income tax is now due and payable. I am of opinion that the sum so paid was interest, both in name and in reality. . . . Here the trustees on Hugh Lees estate were deprived of the use of this sum of £1,040, and if they had had it, presumably they would have invested it, and if they had invested it, presumably it would have yielded them $3\frac{1}{2}$ per cent., and, therefore, as recompense for being deprived of the use of this trust money, they had awarded to them the sum which it would have earned in their hands, if placed in a proper trust investment. That appears to me to make it quite clear that this was interest in the proper sense of the word and not liquidated damages.

Then the LORD PRESIDENT refers to the judgment of WRIGHT, J., and says :

I offer no opinion upon the question whether that judgment is in accordance with the law of Scotland or not. All I say is that that case is not the case before us, because in the case before us an attempt was made to make Dun's representatives liable in damages on the ground that Dun had fraudulently misappropriated the trust money, and that view was deliberately rejected by the court, who found the representatives of Dun liable in interest and in interest only. If that be so, then this duty must plainly be paid, for the claim falls within the precise terms of the charging statute, the second section, sched. D, of the statute of 1853, which runs, "and for and in respect of all interest of money not charged by virtue of any of the other schedules contained in this act."

That judgment, I am bound to say, appears to me to show good sense and good law when the LORD PRESIDENT points out that if the money of which the trustees had been deprived had been left in their hands in the proper way and at the proper time, they would have had the profits and the benefit of it ; and equally so in this case, it is clear that if Capt. Woolf Barnato as the beneficiary had been paid the proper sum at the time when he ought to have been paid the proper sum, if the accounts had been kept in due order—that is, on Feb. 28, 1917—he would have had that money in his hands and the beneficial use of it for the whole time, and it was owing, not to any fraud, as the case has proceeded, on the part of the defendants, but owing to their negligent and improper accounting he was deprived of that money for all that time, and he was entitled, according to the ordinary law, either to the profits or to interest, and I see no reason at all why the appropriate sums payable under the admissions embodied in the consent order of ROMER, J., should not be treated as interest here in the ordinary sense.

One or two other cases were referred to, but they do not appear to me to take the matter any further in this regard. Reference was made to certain language of LAWRENCE, L.J., in the case of *Re National Bank of Wales* (2), in *Simpson v. Maurice's Executors* (5). I need not refer to the facts of that case because they seem to me to be entirely different from anything which has to be dealt with in the present case. The question arose in regard to money paid under art. 297 (e) of the peace treaty. LAWRENCE, L.J., pointed out, in agreement with what ROWLATT, J., said, that such money was paid as compensation in respect of damage or injury inflicted upon the property of the person in question. It requires a little effort of memory now, but in those days one was familiar with the rule that under the peace treaty compensation had to be paid in respect of property which had been detained and was eventually restored under the treaty, and, as LAWRENCE, L.J., said :

The damage or injury inflicted upon that property was the application by Germany of exceptional war measures which had the effect of removing from Mr. Kay and

the respondents the power of disposition over that property without affecting its ownership. Art. 297 of the treaty says nothing about the payment of interest, and the money paid under the direction of the Mixed Arbitral Tribunal was paid as compensation and not as interest. Neither the fact that the compensation was measured by the amount of the interest, which but for the embargo placed upon the money by the German Government could have been earned by the respondents, nor the fact that part of the compensation was described as "interest" in the decision of the Mixed Arbitral Tribunal, in my judgment has the effect of altering the character of the compensation paid to the respondents. The decision of WRIGHT, J., in *Re The National Bank of Wales* (2) at p. 650 that in a case where a judgment had been pronounced for a lump sum with interest, the interest was in the nature of damages and not interest within the meaning of the Income Tax Acts, shows that the mere fact that part of the compensation in the present case is called "interest" does not operate to make it taxable income if in truth it is awarded as damages or compensation.

As I have said, the facts before LAWRENCE, L.J., were completely different, and LAWRENCE, L.J., had not before him the distinction which is relevant here between money paid by way of damages, which was the basis upon which WRIGHT, J., puts his judgment, and money paid as interest for a debt withheld simply owing to the failure of a trustee properly to account and to account in due course.

Some other cases were referred to, but I do not think they carry the matter any further, and, therefore, I do not intend to say any more about them. In my judgment, on the view which I take of the meaning of para. 7 of clause 33 of the award, I think the commissioners were wrong in law in holding that the money which, as they say, was calculated on an interest basis, was not interest within the meaning of the Income Tax Acts.

I may refer to a subsidiary argument advanced on behalf of the appellant here, Capt. Woolf Barnato, which was to the effect that you cannot have interest at all or in any sense until it is clear that all capital moneys have been fully accounted for. It was put in this way: it was said that there cannot be a profit until there has been a complete reimbursement, and in this case all that was reached was a compromise, and it is impossible to say, so it is said, whether there was any complete or correct accounting of the trust moneys to Capt. Woolf Barnato at all. Now as to that I should like to observe, first of all, that we are here dealing with what is tantamount to a judgment of the court. The ascertainment of the true amount due at the accounting date was left by the court to the special referee in so far as the accountants were unable to certify, and a conclusion was arrived at—it may be that that was not enough—that the amounts awarded were not enough to satisfy the lawful and proper claim of Capt. Woolf Barnato; but it is impossible to take that view certainly as between Capt. Woolf Barnato and the defendants in that action. As between them the matter is *res judicata*; the matter was fought out and disposed of, and what was arrived at must

be taken, certainly can only be taken, as between these two parties as the true amount, as representing the true facts. It is what was arrived at as the best possible approximation to the true facts; it is conclusive as between them, and for the purpose of the taxing authorities they are entitled to accept that as representing the truth. No circumstances have been adduced to falsify the conclusions arrived at in that serious way, and in my opinion the matter must be decided on the footing that the true amounts have been ascertained and that the interest on those amounts is interest in the ordinary sense and falls to be dealt with on the ordinary footing.

There is only one other matter to which I have to refer, a final argument, and that is that this particular interest, if I may now call it so, does not come within the taxing sections. Reliance is placed upon the language of sched. D and on the language of the rule applicable to case III. Case III, r. 1, is in these terms:

The tax shall extend to—(a) any interest of money, whether yearly or otherwise, or any annuity, or other annual payment, whether such payment is payable within or out of the United Kingdom, either as a charge on any property of the person paying the same by virtue of any deed or will or otherwise, or as a reservation thereout, or as a personal debt or obligation by virtue of any contract, or whether the same is received and payable half-yearly or at any shorter or more distant periods.

It is contended that this is not interest payable within the words of that rule and in particular that it is not a personal debt or obligation by virtue of any contract. It might have been enough to say that in this court that matter is disposed of by the decision in *Smith v. Smith* (6), where a question arose as to the right to deduct income tax from payments of maintenance which a husband had been ordered to make to his wife. The question was raised whether from those payments income tax could be deducted, and sched. D, case III, r. 1 (a), was discussed. That was on the footing of annual payments. WARRINGTON, L.J., and LORD STERNDALÉ, M.R., said this, discussing that point:

The words in case III, r. 1 (a) “whether such payment” and so forth, do not, in my opinion, limit the annual payments to those there mentioned, but merely provide that they at all events shall be included.

In other words, the words which are being relied upon are not words of delimitation; they are equivalent to “shall include,” and therefore we are left with the broad words of sched. D, r. 1 (b),

All interest of money, annuities, and other annual profits or gains not charged under sched. A, B, C or E, and not specially exempted from tax.

Then there are the general words of case III, to which the rules are appended,

Tax in respect of profits of an uncertain value and of other income described in the rules applicable to this case.

I treat this particular matter of interest as falling within these general words of sched. D. and as falling within the words of case III, but even if I were wrong on that, case VI would, I think, cover the matter and meet the objection which is here made. I may refer again to the case in the Scottish Court of Session of *Schulze v. Bensted* (4), where interest of a character not dissimilar to that here in question was treated as taxable under the Income Tax Act, 1853, sched. D, and Income Tax Act, 1842, case III. I must, however, add that it appears to me that this interest was payable under a contract, because the obligation in respect of this interest was fixed by admission 9, which is embodied in the order of ROMER, J., and admission 9 represents the consent and agreement of the parties as at that stage. In the result, I think that the judgment of SINGLETON, J., should be affirmed.

SLESSER, L.J.: After the very complete exposition of the facts in this case by LORD WRIGHT, M.R., I do not feel it necessary to add very much to what has been said, but, in my view, when this case is closely examined and the complexities of it are simplified it resolves itself into one, or possibly two, comparatively simple issues. As I read the case submitted by the commissioners to the learned judge, clause 33, paras. 6 and 7, I think it is reasonably clear what they intended to find and what they intended to submit to the judge for his consideration. Para. 6, which has been read by my Lord, starts by saying that it is not possible to differentiate between the sums of £200,000, £350,000 and £327,250. As to the last sum, as has been stated, that has resulted from the award of Mr. Harold Brown after the earlier matters had been ascertained, and I think it is clear, whatever else is doubtful, that the commissioners were right when they said that it was not possible to differentiate in principle between the three sums which were ultimately paid to Capt. Woolf Barnato. Equally are they right when they say that the last sum is described in the award as a single capital sum. But those words I read to be merely words of description and they are in fact the words which are used in the award, "the defendants shall make to the plaintiff payment of a single capital sum," and in no way conclude the matter; but in para. 7, I think, are found the real reasons on which they came to their conclusion, for there they say:

Having heard the evidence of Mr. Allan, the chartered accountant who acted for Capt. Barnato throughout the proceedings during the negotiations for settlement, and having regard to the nature of the appellant's claim, we consider—

then follow what I read to be the operative words of their decision—

that that portion of the total sums paid to the appellant, which was calculated on an interest basis was interest in the nature of damages or compensation.

I think, therefore, that the commissioners did come to the conclusion that there was a portion of the total sums which is to be applied both to the earlier sums and to the sum paid under the award, which sums were capable of disintegration into capital and interest; and, as I read the evidence in the case which they exhibit, it was scarcely possible for them to come to any other conclusion. In the order made by consent by ROMER, J. (as he then was), there was an admission in para. 7—one of the admissions on which the order proceeded—that the defendants were chargeable with compound interest at $4\frac{1}{2}$ per cent. per annum with yearly rests, and it goes on to say, “the plaintiff accepting the same in lieu of annual profits thereon,” and an exclusion of interest before Dec. 31, 1913, “upon sums which are to be treated as accretions of capital,” and so on. As I read exhibit “D”, the accountants’ report and the certificate subject to the matters left open for final adjudication which are there stated, that also is treated on a system of analysis of the sums into capital and interest. But however that may be, I do not feel called upon to say whether the commissioners could or could not have come to the conclusion that this was a disintegrated sum, because, as I read para. 7 of the order, they have in fact treated it, as they say, as calculated on an interest basis.

Proceeding, therefore, on the assumption that part of this sum was paid to Capt. Woolf Barnato on an interest basis and part of it upon a capital basis, the question follows: were the commissioners right in coming to the conclusion that this was interest in the nature of damages or compensation, and not interest within the meaning of the Income Tax Acts? So far as regards damages, the only case, I think, that has been cited to us specifically dealing with that point is that of *Re National Bank of Wales, Ltd.* (2), and particularly the observations of WRIGHT, J., on p. 650, to the effect that “the matter must be regarded for this purpose as if the respondent had fraudulently given away £37,000 of the capital of the company.” There is no doubt in my mind that the whole of the proceedings of *Re National Bank of Wales, Ltd.* (2), in so far as they are relevant to the matters which we have here to consider, were based upon a finding that there had been a misfeasance either amounting to or comparable with, and of the same order as fraud. The liquidator asked for a declaration that Mr. John Cory was guilty of misfeasance or breach of trust, and the learned judge has come to this conclusion, as he stated on p. 643 after dealing with the facts of the case, “that”—that is, the representations made—“as it seems to me, is fraud, or at any rate it involves the same consequences as fraud.” In the Court of

Appeal, where the judgment of WRIGHT, J., was reversed upon that matter, at p. 666, LORD LINDLEY, M.R., says :

WRIGHT, J., has come to the conclusion that Mr. John Cory was not only negligent but fraudulent ; or, at all events, guilty of misconduct equivalent to fraud as regards its legal consequences.

As regards the other matter mentioned by the commissioners, that this was interest in the nature of compensation, I think that the word "compensation" used in that context is a rather unfortunate one, because it is a phrase very liable to confusion. If by those words the commissioners mean that it was money paid in the nature of compensation akin to damages, there would be no complaint in the use of the phrase. That was, I think, in fact the language of the statute, and the powers under the statute which were given in this country to a British subject claiming moneys under the Treaty of Versailles and the machinery provided thereunder for the obtaining of compensation from Germany as the result of moneys held by the German Government during the war. That was the compensation of which LAWRENCE, L.J., speaks in the case of *Simpson v. Maurice's Executors* (5). There there was compensation, but it was compensation akin to or comparable with damages, and the observations of LAWRENCE, L.J., to which reference has been made, more particularly at p. 606, where he quotes the decision of WRIGHT, J., in *Re National Bank of Wales, Ltd.* (2), make it clear that he uses the word "compensation" in that context, for he says this : "The interest was in the nature of damages and not interest within the meaning of the Income Tax Acts," and that "shows that the mere fact that part of the compensation in the present case is called 'interest' does not operate to make it taxable income if in truth it is awarded as damages or compensation." But if by "compensation" the commissioners mean, not compensation in the nature of damages, but compensation in the sense that a party to an action, after an account being taken, has been declared entitled to some money, then I think their conclusion ought to have been the contrary of what it was. In my view it is impossible here, when the matter is rightly considered, to say that the sum here awarded to Capt. Woolf Barnato in any of these three payments was damages or compensation in the nature of damages.

I turn to the statement of claim upon which Capt. Woolf Barnato ultimately succeeded in obtaining money through the process of the order of the court, the investigation and the ultimate compromise, to see whether there is any suggestion in the statement of claim that damages in the sense in which they were claimed, or said to have been claimed, in the case of *Re National Bank of Wales, Ltd.* (2), were ever demanded at all. As I read that case it is not a case claiming damages. The statement of claim, after reciting the history of the case, to which my Lord has already

referred, complains in para. 15 that the defendants never at any time kept separate or proper accounts of the estates. In para. 17 it is said that as a result of the production and examination of the said books of account and documents it has been ascertained that the defendants as executors and trustees of the said two wills did not give proper effect to the trusts, and that it has been further ascertained that there are numerous errors manifestly appearing in the books of account and documents. Then in para. 18 it is said that on the true construction of the wills the plaintiff's matters ought to have been treated as first charges on the capital; and in para. 19A, which really sums up the complaints, it is put thus :

The said accounts omit all mention of or reference to the diamond business and the transactions thereof, and the defendants wrongly allege that the diamond business was no part of the business carried on by the firm of Barnato Brothers.

When I say it sums up the complaints, I mean it sums up the complaints in so far as it refers to that matter. The other matters I have already drawn attention to. Then in paras. 32 and 33, again, complaints are made that payments were not properly debited or losses borne. So that the whole matter is put as on a basis of wrongful accounting and failure to account for matters which ought to have been accounted for. The complaint against the defendants as partners is put in the same way as the complaint against them as trustees, and it is said in para. 40 :

As disclosed by such accounts as have been produced the defendants have throughout regarded their own interests as such partners and residuary beneficiaries as aforesaid and have not properly safeguarded the interests of the plaintiff as a legatee under such wills and they have not accounted to the plaintiff in the manner in which it is their duty to account.

That is the highest complaint which is put, and as I read it, and as the claim of the plaintiff next stated shows, what were asked were declarations that on the proper construction of the will the plaintiff was entitled to certain profits and that the diamond business ought to have been brought in, and following upon those declarations dealing with some other matters which it is not necessary here to mention, a demand for :

(4) An account of all dealings and transactions as from June 14, 1897, of the said partnership business of the firm of Barnato Brothers referred to in the said wills and the said indenture of Feb. 28, 1917, including the diamond business. (5) An inquiry of what the credits property and effects of the said firm consisted as on Feb. 28, 1917,

and finally this remedy,

(6) To have the share of the plaintiff in such credits property and effects ascertained on the footing of the above declarations.

It seems to me that such a demand for an account and inquiry as to the administration of the trusts and the partnership is wholly different from a claim sounding in damages or anything like damages, and I think that the commissioners were not entitled on that claim to come to the conclusion to which they did.

But the matter does not end there, because, as has been stated by my Lord, on the matter coming into court there was an order made by consent, but none the less an order of the court, containing admissions as to the construction of the wills, the distribution of the capital, the right to participate in profits and the like, and, among other matters, in terms saying that the defendants are to be charged with compound interest at $4\frac{1}{2}$ per cent. per annum with yearly rests on all and any moneys found due to the plaintiff from time to time, the plaintiff accepting the same in lieu of annual profits thereon. So that, had he not accepted this interest in lieu of the profits, his claim would have been one for profits and not for damages; nor is there any suggestion that I can see in this enquiry order that the results shall be in damage. At the end it is stated thus: that there shall be an account of the moneys due, and thereafter there is to be:

power for them [that is the accountants] jointly to certify from time to time any matter relevant to any account or inquiry hereinbefore directed (including a complete answer to any such account or inquiry if they are agreed thereon) and with power so to certify any matters either absolutely or subject to the reservation of any points whether of principle or detail for the consideration of the special referee and any such certificate of the said accountants is to be binding on the parties.

As I have said, these things were done. They did make their certificate; they reserved in their certificates certain matters which they state for the consideration of the special referee, whether there are any, and if so what, transactions not disclosed by Barnato Brothers, with regard to Abrahams and the books of the syndicate, and valuations as to the New Jagersfontein Mining and Exploration Company, and certain other matters which the special referee duly certified. I mention these matters merely to show that in no sense can they be said to constitute a claim for damages.

Finally, on this head I would refer to two Scottish cases where this matter has been considered. They have been referred to by my Lord, but in my opinion, with respect, they seem to me to be entirely correct in principle. There also a distinction is made between such a case as we have in *Re National Bank of Wales* (2), where damages have been

obtained and the interest so-called is merely a means of arriving at a measurement of the damage, and a case where the interest is true interest, awarded upon an account following upon the improper use of the partnership or trust. It is significant that the LORD PRESIDENT, in the case of *Schulze v. Bensted* (4), draws attention to the fact that they were asked there to hold that it was damages and not interest, solely, I think, upon the authority of the judgment pronounced by WRIGHT, J., in the case of *Re National Bank of Wales* (2). Then, having quoted from WRIGHT, J., he says this :

I offer no opinion upon the question whether that judgment is in accordance with the law of Scotland or not. All I say is that that case is not the case before us, because in the case before us an attempt was made to make Dun's representative liable in damages on the ground that Dun had fraudulently misappropriated the trust money, and that view was deliberately rejected by the court, who found the representatives of Dun liable in interest and in interest only.

The other case, which I do not think was mentioned by my Lord but is to the same effect, is the case of *Sweet v. Macdiarmid* (7). Those two cases seem to me to establish a proposition which applies in this case, and which, though perhaps there is no case directly in point in this country, seems to me entirely applicable. Where, on the consideration of the realities of the case, it emerges that the money is paid as interest and is not paid merely as a means of measuring damages, there it can properly be said that it satisfies the requirement of case III (1) that the tax shall extend to any interest of money.

As I read the case as it was before the commissioners and the learned judge, that really was the issue, and perhaps the only issue, before the court. But in so far as the case has been argued upon the other grounds mentioned by my Lord, and alternative arguments have been put before us, I will content myself with saying that I entirely agree with what my Lord has said upon those alternative arguments and have nothing further to add. In my view, however, the commissioners were not entitled to come to the conclusion at which they arrived—namely, that this having been found to be interest was damages in the nature of interest and not interest proper. Consequently it follows that the learned judge was right in answering the case as he did, and this appeal must fail.

ROMER, L.J. : After the judgments that have already been delivered I have but comparatively few words to add. For the purpose of deciding the question before us it is essential, in my judgment, to bear in mind quite clearly what it was that the plaintiff was claiming in his action against Messrs. Joel. When he retired from the partnership on Feb. 28, 1917, it was thought that there was due to him a sum of £295,000 in

cash and no more, together with certain investments the value of which was something over £400,000 ; and in due course those investments were transferred to him and the cash was paid. But the plaintiff subsequently had reason to think, and later events showed that he was right in so thinking, that there was more due to him on Feb. 28, 1917, than the sum that had been paid to him. This action was instituted for the purposes of finding out what that additional sum was and of having it made good to him by the two Messrs. Joel—whether as continuing partners in the business which the plaintiff had left, or as trustees, it matters not. The appellant says that the action was brought against Messrs. Joel as trustees, and I am quite content to assume that that was so for the purposes of this appeal. By his statement of claim he asked that an inquiry might be directed as to what the credits, property and effects of the firm consisted of as on Feb. 28, 1917, and he also asked for an account of all dealings and transactions of the business up to Feb. 28, 1917, for the purpose, no doubt, of finding out what there was due to him in respect of the accumulated profits earned by the two sums of £250,000 which had been bequeathed to him by the two testators. This claim for an account, the claim for an inquiry, which was followed by a claim to have the plaintiff's share in the property and effects ascertained, was preceded by some claims to declarations relating to the principle upon which the inquiry and the accounts should be directed and taken.

If the plaintiff were successful in his action and proved that on Feb. 28, 1917, there was a larger sum due to him than had been paid, he was, of course, entitled to have that sum made good by the two trustees ; but he was entitled to more than that. So far as anything found due to him had been used by the trustees in the business, he was entitled to have the profits made by such user of his money, or at his option he was entitled to have interest paid on such money. If he had elected to take profits, I cannot see how it could be suggested for a moment that any profits he so recovered could be regarded in any shape or form as damages. As we know, in the end he elected to take interest in lieu of profits, but any interest that the trustees were directed to pay him in addition to the principal sum would not be damages. As was pointed out by JAMES, L.J., in *Vyse v. Foster* (1), the Court of Equity did not punish trustees who had failed to perform their trust ; the trustees would be ordered to pay the interest because in the eyes of equity that interest belonged to the plaintiff ; it was interest which had been earned, or must be deemed to have been earned, by the trustees by the use of the plaintiff's money.

In the Scottish case to which my Lords have already referred, *Schulze v. Bensted* (4), an action had been brought by a trustee of a fund against the legal personal representatives of a deceased trustee who had by his negligence failed to get in an asset belonging to the trust, and by the

decree of the court the representatives of the deceased trustee were ordered to repay the sum involved, together with interest at the rate of $3\frac{1}{2}$ per cent. from the date at which the sum should have belonged to the trust. The interest was in due course paid to the trustees of the fund without deduction of income tax, and it was held by the Court of Session, First Division, "That the appellant"—that is, the trustee who had received the money from the estate of the deceased trustee—"was rightly assessed under sched. D in respect of the interest." LORD WRIGHT, M.R., has already referred to the judgment of the LORD PRESIDENT and read extracts from it showing how the LORD PRESIDENT distinguished the case before the court from the decision of WRIGHT, J., in *Re National Bank of Wales* (2). I wish to refer in addition to a passage in the judgment of LORD JOHNSTON, which is on p. 34 of the report. He said :

In these circumstances there was restored to the trust a principal sum which ought throughout to have been in the trustees' hands and bearing interest, and there was also restored to the trust a sum representing that interest at the rate of $3\frac{1}{2}$ per cent. But this latter sum was so restored as at Nov., 1911, in one sum without reference to its accrual termly between 1902 and 1911 at a modified rate assumed to be the average return on the trust investments and without compound interest. When it reached the hands of the trustees it was a *surrogatum* for that which ought to have termly reached the hands of the trustees and have been applied by them as income, in which case it would have been subject to income tax, and when it did reach their hands I think they were equally bound to apply it in accounting with the beneficiaries as income, and I am unable to see any sound reason for holding that it did not become liable to income tax in the hands of the trustees when received.

With that passage from the judgment of LORD JOHNSTON I desire to express my respectful concurrence. Adopting it in the present case, I should say that if the plaintiff recovered, in addition to the extra principal sum due to him on Feb. 28, 1917, anything in the shape of interest, when it reached his hands it was a *surrogatum* for that which ought to have termly reached his hands, in which case it would have been subject to income tax. When it reached the hands of the plaintiff I think it was income in his hands, and I am unable to see any sound reasoning for holding that it did not become liable to income tax in his hands when so received.

But then it is said : " Oh, well, assuming that is so, in the present case the three sums that have been received by the plaintiff as a result of this action were not received in respect of interest at all ; they were lump sums in which no distinction was made between capital and income," and that it is impossible to find out how much capital was due to the plaintiff on Feb. 28, 1917, and inasmuch as that sum can never be ascer-

tained it is impossible to say whether there was any, and if so, what sum of interest on that sum paid to him. In the first place it is said by the appellant that there is a finding of fact to that effect by the commissioners. I do not so read the case. In clause 29 of the case the commissioners, after referring to a document marked "G" which had been prepared on behalf of the Crown for the purposes of the Crown's argument and which purported to show how much of the sums received represented income, state this: "Thus the amount of interest included in the payments made was"—and then it sets out the figures. That appears to me to be a finding of fact on the part of the commissioners that an amount for interest was included in the payments made and that that amount could be and had been ascertained. It is true that in clause 33, para. 6, of the case the commissioners go on to say that it is not possible to differentiate between the sums of £200,000, £350,000 and £327,250, and that "as regards the last sum it is described in the award as a single capital sum," and they hold that the same designation must be attached to the earlier sums of £200,000 and £350,000. I do not think it was their intention in that clause to find that these sums represented capital and not interest. To start with, it is inconsistent with their finding in clause 29; in the next place it seems to me to be inconsistent with their finding in clause 33, para. 7, in which they say that, having heard the evidence of Mr. Allan "and having regard to the nature of the appellant's claim, we consider that that portion of the total sums paid to the appellant which was calculated on an interest basis was interest in the nature of damages." Further, I do not think that the commissioners could possibly have intended to find that no part of these three sums received by the plaintiff represented interest, because such a finding would have been directly contrary to the plain evidence that was before them.

The order which was made when the case came before me was an order, as has been pointed out, made by consent of the parties. The order contained certain admissions as to the principle upon which the accounts and inquiries that were going to be directed should be ascertained, and practically embodied the earlier declarations for which the plaintiff had asked in the claiming part of his statement of claim. The only important one of those admissions for the present purpose, I think, is this: that it was agreed that the trustees should be charged with compound interest at $4\frac{1}{2}$ per cent. per annum on all or any moneys found due to the plaintiff from time to time until payment, with the proviso that interest should not commence to run until Dec. 31, 1913. The order then went on to direct certain accounts and inquiries to be proceeded with before the special referee. The parties saw that if the whole matter was to be opened before the special referee, the proceedings would take a very long time and would be unnecessarily expensive, and so very wisely they agreed that in the first instance the accountants on each side should

go into the matter and see how far they could agree, and that they should certify the points on which they were agreed and certify the points which in their opinion should be left to the decision of the special referee. The order ends up as follows :

The special referee as above mentioned shall not proceed with the said accounts and inquiries unless and until the plaintiff or the defendants shall give him not less than seven days' notice in writing requiring him so to proceed the defendants and the plaintiff by their counsel undertaking so far as they are reasonably able so to provide that in the meantime—

then the accountants are named—

in their capacity of accountants for the parties respectively but not as arbitrators shall personally or by their representatives work upon the said accounts and inquiries continuously with a view to eliminating all matters upon which they can agree and with power for them jointly to certify from time to time any matter relevant to any account or inquiry hereinbefore directed (including a complete answer to any such account or inquiry if they are agreed thereon) and with power so to certify any matters either absolutely or subject to the reservation of any points whether of principle or detail for the consideration of the special referee and any such certificate of the said accountants is to be binding on the parties and any such reserved points are to be defined by the said accountants with a view to their being submitted with as little delay as possible to the special referee for decision.

So that the accounts and enquiries were to be worked out in this way : partly by a certificate of the accountants and partly by a decision of the special referee upon the points which the accountants reserved for his decision. The accountants did agree upon nearly everything, and their certificate is to be found in exhibit "D" to the case. It will be found, on looking at p. 10 of that document, that the accountants were agreed as to the amount that was due to the plaintiff for cash on Feb. 28, 1917—or rather, I should say, they were agreed as to two sums, one of which would represent the amount then due. I will only refer to the sum that is mentioned as being based upon the defendants' valuation, because it will be found later on that that was the valuation upon which the parties proceeded. They found that on that date, Feb. 28, 1917, there was due to the plaintiff a sum of £808,858. From that, of course, had to be deducted—and the accountants did deduct—the cash which was paid to the plaintiff on or about Feb. 28, 1917. In that way the amount of cash unpaid due to him on Feb. 28, 1917, was ascertained. They then calculated compound interest on that sum down to Dec. 31, 1925. In the meantime, however, a sum of £200,000, which is the first of the sums with which we are concerned on this appeal, had been paid to the plaintiff. That sum had to be deducted from the capital sum and the necessary adjustments made in respect of compound

interest on that sum. The result of it all was that there was found due to the plaintiff by this document on Dec. 31, 1925, the sum of £540,722. Now it is the easiest possible matter for any accountant—I will go further, and say it is the easiest possible matter for any competent schoolboy—on the figures contained in this exhibit “D” to ascertain precisely what the commissioners found remained owing to the plaintiff in respect of the capital sum due to him on Feb. 28, 1917. The balance of course, represented the interest to which I have already referred.

The two matters were referred to the special referee. Again, instead of the special referee being called upon to come to a decision upon those two points, the parties very wisely put their heads together and agreed those matters between themselves. The result of the compromise then made is embodied in exhibit “F,” which is attached to the case, and it appears that they were agreed that to the sums so found due to the accountants as owing on Feb. 28, 1917, should be added, first of all, in respect of the diamond business a sum of £11,287 with compound interest at $4\frac{1}{2}$ per cent. per annum on that sum from Jan. 31, 1902, to Feb. 28, 1917; that there should also be added in respect of the diamond business a sum of £1,384, with compound interest on that sum from June 30, 1911, to Feb. 28, 1917; that there should be finally added in respect of undervaluation of investments a sum of £46,308 with compound interest at the same rate on that sum to Feb. 28, 1917. The amount of interest on those three sums to Feb. 28, 1917, has not in fact been calculated in this document, but it is all included there, because they have calculated the compound interest on those three sums right down to Dec. 31, 1925. Then, of course, they calculate compound interest on the sum of £540,722 from Dec., 1925, down to the date of the award, which is Apr. 12, 1927, as they do on these other sums. The result of it all is that three sums have been paid to the plaintiff: £200,000, £350,000, and finally this sum of £327,250 which was mentioned in the award, which merely embodied the compromise arrived at by the parties in this exhibit “F.” I venture to say again that it is the easiest possible matter to ascertain how much of those sums which had been received by the plaintiff represents capital which had been underpaid to him on Feb. 28, 1917, and how much of it represents interest on that sum down to Apr. 12, 1927.

For these reasons it appears to me that it is not open to the appellant to say that this is a compromise for a lump sum which does not distinguish between capital and interest. It appears to me that throughout exhibit “D” and exhibit “F” the parties have been at pains to ascertain how much was due on Feb. 28, 1917, for principal and how much has since accrued on that sum for compound interest. I do not wish to add anything upon the other points with which LORD WRIGHT, M.R., and

SLESSER, L.J., have dealt, except to express my entire concurrence with them. The appeal, as it seems to me, fails and must be dismissed.

Appeal dismissed with costs.

Action referred to special commissioners to find the amount of interest to be assessed to tax.

Leave to appeal to the House of Lords refused.

Solicitors: *Hill, Dickinson & Co.* (for the appellant); *Solicitor of Inland Revenue* (for the respondents).

[*Reported by* DEREK H. KITCHIN, ESQ., *Barrister-at-Law.*]

Re SMITH'S WILL TRUSTS, SMITH *v.* MELVILLE.

[CHANCERY DIVISION (Farwell, J.), July 7, 1936.]

Settlements—Tenant for life and remainderman—Settled share of residue—Ordinary and preference shares appropriated thereto—Payment of past preference dividend by transfer of ordinary shares—Capital or income.

Two shares of the residue of the testator's estate were directed to be settled and the trustees appropriated to such shares certain cumulative preference and ordinary shares in a company. For some years the company was unable to pay the dividend on the preference shares, and ultimately an arrangement was made by the company with the sanction of the court that the preference shareholders should receive two thirds of the ordinary shares in satisfaction of all outstanding dividends. The trustees of the will were not entitled by their holdings of shares to control the action of the company in this respect. The trustees having received these ordinary shares it was contended by those interested in the capital of the shares of the residue that some part of such ordinary shares should be treated as capital:—

HELD: the ordinary shares were income and must be transferred to those entitled to the income.

[EDITORIAL NOTE.] In the usual contest of this nature, the shares allotted to settlement trustees represent capitalised profits, but in this case ordinary shares were allotted to the trustees in payment of arrears of dividend upon the cumulative preference shares. The difficulty or complication arose from the fact that the trustees were also holders of ordinary shares, so that in addition to receiving certain ordinary shares in respect of past dividends on preference shares, they had to give up part of their ordinary shares to the company as a contribution to the fund out of which the payment was made. In respect of this giving up of capital it was urged that some part of the ordinary shares received should be treated as capital, but the court did not take this view.

FOR DISTINCTION BETWEEN INCOME AND CAPITAL, see HALSBURY, 1st Edn., Vol. 25, Settlements, pp. 607-612, paras. 1071-1078; and FOR CASES, see DIGEST, Vol. 40, pp. 660-669, Nos. 1986-2061.]

Cases referred to:

- (1) *Re MacIver's Settlement*, *MacIver v. Rae*, [1936] 1 Ch. 198; Digest Supp.
- (2) *Re Wakley*, *Wakley v. Vachell*, [1920] 2 Ch. 205; 9 Digest 598, 3994.
- (3) *Re Sandbach*, *Royds v. Douglas*, [1933] Ch. 505; Digest Supp.

ADJOURNED SUMMONS. By his will dated Nov. 24, 1905, Josiah Timmis Smith, after appointing Henry Parish, Ernest Trubshaw and his daughter, Agnes Smith, the plaintiffs herein, to be executors and trustees thereof, and after making certain bequests and legacies not material to the matters arising on this summons, devised and bequeathed all his real estate and all the residue of his personal estate to his trustees upon trust to pay his funeral and testamentary expenses, debts and pecuniary legacies and duties, and, subject thereto, to divide the same between his daughters Agnes Smith, Lucy Trubshaw and Eleanor Melville. The share of Agnes Smith was given to her absolutely, but the shares of Mrs. Trubshaw and Mrs. Melville were settled on them for life and thereafter for their children, with an ultimate trust in respect of the

share of each in favour of the other. The trustees other than Agnes Smith were also given power by the will to appropriate and allot any part of the debentures, debenture stock, stocks, shares or securities held by the testator at his decease (other than the shares in certain named companies) in or towards satisfaction of any share in his residuary estate.

The testator died on Mar. 31, 1906, and his will was proved on May 11, 1906. In or about the month of September, 1923, the final payment or appropriation of investments was made to Agnes Smith in full satisfaction and discharge of her one third share of the estate of the testator, and the remaining investments and properties forming part of the testator's residuary estate were divided and appropriated by the trustees to the respective shares of Mrs. Melville and Mrs. Trubshaw, Agnes Smith, Harold Ernest Trubshaw and George Pearsall Locker being appointed trustees of Mrs. Melville's settled fund, and Agnes Smith, Harold Ernest Trubshaw and Henry Coulson Bond being appointed trustees of Mrs. Trubshaw's settled fund.

At the date of his death the testator had a very considerable holding in preference and ordinary shares in a company known as Richard Thomas & Co., and immediately prior to Dec. 17, 1934, the trustees of Mrs. Melville's settled fund held 29,164 $6\frac{1}{2}$ per cent. £1 cumulative preference shares and 50,494 £1 ordinary shares in the said company, and the trustees of Mrs. Trubshaw's settled fund held 11,875 $6\frac{1}{2}$ per cent. £1 cumulative preference shares and 35,245 £1 ordinary shares in the said company. Down to the year 1926 the company was a very prosperous one, but in or about that year it began to experience trading difficulties, and on Dec. 17, 1934, the dividends on its preference shares were in arrear as from Apr. 1, 1927, and no dividend was paid on the ordinary shares of the company from Dec. 23, 1925, until the scheme hereinafter mentioned had been passed and approved. On Dec. 17, 1934, the company issued to its shareholders a scheme for reorganisation of share capital. That scheme provided, *inter alia*, that each of the existing ordinary shares of £1 each in the capital of the company should be subdivided into three ordinary shares of 6s. 8d. each, that each of the existing holders of the said £1 ordinary shares should retain one of the 6s. 8d. ordinary shares in respect of each of his £1 ordinary shares, and that the remaining 6s. 8d. ordinary shares should be contributed by the ordinary shareholders for the purpose of the scheme and (in consideration of the preference shareholders consenting to the cancellation of the arrears of dividend as thereafter provided) should be distributed amongst the holders of the preference shares as on the date on which the scheme should take effect in proportion to their holdings of preference shares, and that the 7 years' dividend accrued on the issued preference shares of the company to Mar. 31, 1934, and unpaid should be cancelled

and extinguished and the dividend thereafter paid on such shares should be calculated as from Apr. 1, 1934. The said scheme was approved at separate meetings of the preference shareholders and the ordinary shareholders of the company held on Jan. 28, 1935, and was sanctioned and approved by an order of this honourable court dated Feb. 25, 1935.

Pursuant to the scheme the trustees of the Melville settled fund retained 50,494 6s. 8d. ordinary shares in the company and gave up 100,988 6s. 8d. ordinary shares, and were allotted 52,163 6s. 8d. ordinary shares in the company and 1s. 11d. in cash in respect of their holding of preference shares, and the trustees of the Trubshaw settled fund retained 35,245 6s. 8d. ordinary shares in the company and gave up 70,490 6s. 8d. ordinary shares, and were allotted 21,239 6s. 8d. ordinary shares and 4s. 7d. in cash in the company in respect of their holding of preference shares.

Mrs. Melville and Mrs. Trubshaw both survived the testator and Mrs. Melville, who had three children, was alive at the date of the summons. Mrs. Trubshaw, who had five children, died on Aug. 19, 1934, and appointed the defendants Harold Ernest Trubshaw, Charles Smith Trubshaw, Arthur Ralph Trubshaw and Fred Nelson Powell, since deceased, to be the executors of her will and codicil.

In the circumstances as above set out, difficulties having arisen as to whether all or any of the allotted 6s. 8d. ordinary shares ought to be treated as capital or income the present summons was taken out for the determination of the following questions :

(i) Whether the whole or any part of the 52,163 ordinary shares of 6s. 8d. each in Richard Thomas & Co., Ltd., and 1s. 11d. in cash allotted (pursuant to a scheme of reorganisation of share capital of the said company sanctioned by this honourable court on Feb. 25, 1935) to the trustees of the Melville settled fund and of 21,239 ordinary shares and 4s. 7d. in cash allotted as aforesaid to the trustees of the Trubshaw settled fund is to be treated and is distributable as income of the said settled funds respectively, or whether the whole of the said shares and cash respectively is capital of the two settled funds respectively.

(ii) That directions may be given as to any adjustments which ought to be made by the trustees of the two funds respectively in view of the said reorganisation of share capital of the said company and in view of the said respective allotments of ordinary shares.

(iii) If it should be held that any part of the ordinary shares allotted to the trustees of the Trubshaw settled fund is distributable as income of the said settled fund whether any part thereof is payable to the executors of the will of Lucy Trubshaw who died on Aug. 19, 1934, and if so whether such part is to be ascertained on the basis of the proportion which the period from Apr. 1, 1934, to Aug. 19, 1934, bears

to the period Aug. 19, 1934, to Mar. 31, 1935, or how otherwise such part is to be ascertained.

The present scheme came before the court in 1936 in the case of *Re MacIver's Settlement; MacIver v. Rae* (1), when FARWELL, J., held that the shares allotted were to be treated as income in the hands of the trustees of the settlement. But there was a difference between *MacIver's* case (1) and the present one in that the MacIver trustees had not held any ordinary shares.

J. Leonard Stone for the plaintiffs, trustees of the two settled funds, stated the facts.

Fergus D. Morton, K.C., and *R. W. Goff* for Mrs. Melville: We are only concerned with question (i) in the summons. The present case is indistinguishable from *Re MacIver's Settlement; MacIver v. Rae* (1). The fact that the trustees of the MacIver settlement did not hold ordinary shares cannot make any difference or make capital what was declared in *MacIver's* case (1) to be income.

Nor would the application of *MacIver's* case (1) result in any loss to capital. The evidence shows that the result of the scheme, which got rid of the arrears of dividend, has been that the 6s. 8d. ordinary shares which were retained by the ordinary shareholders were at all times worth more than the ordinary shares at their nominal value of £1 each. But even if there had been any depreciation in the capital value of the shares it would not make any difference. Something has been issued to the preference shareholders who have consented to exchange that for their rights to preferential dividends.

Wilfrid M. Hunt, for two of the personal representatives of Mrs. Trubshaw, on question (i), adopted *Fergus Morton's* argument and referred also to *Re Sandbach, Royds v. Douglas* (3).

J. M. Gover, K.C., and *J. B. Lindon*, for two of the Trubshaw children. Our clients are in conflicting positions, but are arguing from the point of view of those interested in corpus. This case is not concluded by *MacIver's* case (1). The parties here are in such a different position from those in *MacIver's* case (1) that there would be nothing inconsistent with the decision in that case in saying in this case that the payments are corpus and not income. The effect of what has happened here is that, in so far as the shares held by the Melville and Trubshaw trustees were concerned, the payments to the preference shareholders were made out of the corpus of the two trust funds. If the matter had depended on the consent of the trustees they would have been obliged, in order to perform their duty of acting fairly between the tenant for life and the remaindermen, to have come to the court. If they had done that the court would have said that although the scheme seemed to be satisfactory there would have to be some adjustment between tenant for life and remaindermen, and it would be impossible under any such arrangement

to treat these shares as income. The reason why the trustees did not come to the court was that they were overborne by the majority of the shareholders, but the court is now able to do what it would have done if the trustees had asked for directions when the scheme was suggested. It is the fact that the trustees hold ordinary as well as preference shares, which makes this case different from *MacIver's* case (1).

J. G. Craufurd, for three of the children of Mrs. Melville, adopted *Gover's* argument.

F. K. Archer, K.C., and *L. W. Byrne*, for two of the children of Mrs. Trubshaw, adopted *Gover's* argument: The question is what ought the trustees to have done with this money when they received it, and that depends on the constitution of their trusts.

FARWELL, J.: I do not at present appreciate what the position would have been if the trustees had come to the court. The scheme having been passed by the necessary majorities and having been approved by the court, the court would have been compelled to say that the trustees were bound by it. That being so, what room is there subsequently to say that the tenant for life is not entitled to this money which represents unpaid dividend?

Archer, K.C.: But if the court would interfere in a case of this kind *in limine*, it cannot be defeated by what has subsequently been done by the company. If the court is given an opportunity of doing justice to the various beneficiaries it will do so.

FARWELL, J.: That is too wide. A beneficiary who has been overpaid cannot be made to repay, although the court has power to adjust matters by means of future payments.

Archer, K.C.: We are not asking your Lordship to say that *MacIver's* case (1) was wrongly decided, but to say, in view of the different facts in this case, that it does not apply. That is the principle which your Lordship applied in *MacIver's* case (1) with regard to *Re Wakley* (2), which your Lordship found on the facts did not apply to *MacIver's* case (1) because there capital remained intact, and what the shareholders received was not income or dividend in the ordinary sense, but something in the nature of a windfall, though on the construction of the trust in that case it was held to go to the persons entitled to income. To decide this case by *MacIver's* case (1) would be to rely on the fallacious principle that what is received is income for all purposes, whereas income is a purely relative matter.

FARWELL, J.: Does *MacIver's* case (1) go to more than this: that if cash had been paid for the arrears it would have come exactly within *Re Wakley* (2). As a result of the scheme the preference shareholders, instead of getting cash got ordinary shares, which therefore were income in their hands.

Archer, K.C.: The difference between *Re Wakley* (2) and this case is that

the scheme here has nothing to do with the company, because the company paid nothing. There is no reduction of capital in any sense. The scheme is really a contract between those entitled to preference dividends and the ordinary shareholders, and is therefore one which raises a real equity for adjustment so that the fund may be distributed fairly between capital and income.

FARWELL, J. : I should have more confidence in your argument if the arrangement had been one whereby the trustees were to give up so many shares and were to take in exchange so many shares so that there was more than one transaction. But that was not the scheme. It was a transaction by the company to which the shareholders agreed as a whole.

Fergus Morton, K.C., in reply : This scheme was an arrangement in which the company took part. The ordinary shareholders were always liable to have their rights altered by some such scheme. It is a fallacy to say that the ordinary shareholders gave up anything. In exchange for shares of the nominal value of £1 each, overweighted with arrears of preference dividends they have received shares of the nominal value of 6s. 8d. free from arrears of dividend. If there is some sort of equity calling for an adjustment those relying on it must point to some principle on which it can be worked out, and in my submission there is no such principle.

The remaining defendants to the summons, who were mortgagees of the Melville and Trubshaw children, were not represented as they were adequately secured.

FARWELL, J. : This summons raises a question of some difficulty which falls to be decided in the execution of the trusts of the will of Mr. Josiah Timmis Smith. The testator made his will on Nov. 24, 1905, and he died on Mar. 31, 1906. It is unnecessary for me to refer to more than one or two passages in his will. He gave his residuary estate to his trustees upon trust to sell and convert and to hold the residue of his estate in trust to divide the same equally between his three daughters, Lucy Trubshaw, Eleanor Melville and Agnes Smith, in equal shares. He then proceeded to settle the shares of his two daughters Lucy Trubshaw and Eleanor Melville, the third daughter, Agnes Smith, being given her share of residue absolutely. The settlements made on the two daughters of their shares in the residuary estate were, putting it shortly, for the daughters for life with remainder to their issue. The will contains a power in the trustees to postpone the sale and conversion of the personal estate or any part thereof for so long as they should in their absolute discretion think fit, and provides that any interest dividends and income to accrue from and after the testator's decease and as well during the first year as any subsequent year of and from such part of his real and

personal estate as should for the time being remain unsold and unconverted should after payment thereof of all incidental expenses be paid to the persons and in the manner to whom the income of the moneys produced by such sale and conversion would for the time be payable under the will if such sale and conversion had been actually made.

After the death of the testator who, as I have said, died in 1906, there was in the year 1923 a final appropriation of investments to the three shares of the daughters. The share which went to Agnes Smith was, of course, her property and went to her absolutely, but separate trustees were appointed of the two other shares and the scheme of appropriation provided for the handing over to those separate trustees certain of the investments which the testator had held at his death.

The testator was, at the time of his decease, the owner of a large holding both in preference and in ordinary shares, in a company known as Richard Thomas and Co., Ltd. These shares had been for the greater part retained by the trustees and under the scheme of appropriation a large sum of $6\frac{1}{2}$ per cent. £1 cumulative preference shares were appropriated to and held by the trustees of both the married sisters. In the case of Mrs. Melville the trustees of her settled fund held 29,164 £1 $6\frac{1}{2}$ per cent. cumulative preference shares and 50,494 £1 ordinary shares in the company. The trustees of the other settled share held 11,875 £1 $6\frac{1}{2}$ per cent. cumulative preference shares and 35,245 £1 ordinary shares in the company.

In the year 1935 the position of the company was this, that for some seven years no dividends whatever had been paid on the preference shares. There was, as a result, a very large sum payable in respect of these past dividends, and it was obvious that until these dividends had been paid there was no hope of the ordinary shareholders getting any dividend at all. Accordingly, in 1935 the company put forward a scheme which really was intended to get rid of the liability for unpaid dividends on the preference shares and so to enable the preference shareholders to be paid in full what was due to them with the result that there might be hope in the future that the ordinary shares would receive dividend. The scheme then really amounted to this. The ordinary shareholders were asked to agree that the shares which they held should be subdivided into three shares of 6s. 8d. each. That of these shares so subdivided two thirds should be taken by the company and handed over to the preference shareholders in consideration of the preference shareholders giving up all claim to the arrears of dividend. The scheme was one by which in effect the preference shareholders sold whatever right they had to arrears of dividend on their preference shares to the company, and received from the company in exchange the ordinary shares which had been contributed by or given up by the ordinary shareholders. The scheme is set out in more detail than

I have expressed it in the statement of facts in the report of the case in *Re MacIver's Settlement* (1), a decision of my own. In that case, and it may be as well for me to deal with it at once, the question arose as between capital and income in connection with this very scheme, but there was this distinction between that case and this, that in that case the trustees held no ordinary shares in the company at all. Their holding was wholly of preference shares. The result of the scheme in that case was that a large block of ordinary shares came into the hands of the trustees, but there was no reduction in the number or the nominal value of the preference shares which the trustees held subject to the trust there in question. The question which arose in that case which I had to determine was whether that block of ordinary shares which had so come into the hands of the trustees were to be treated as capital or income, either wholly or in part, and I held that the ordinary shares which the trustees had received represented the accumulated arrears of dividends on the preference shares. That had the payment been made in cash by the company in accordance with the decision in the Court of Appeal in *Re Wakley* (2) that cash would have gone to the persons who, at the time of payment, were entitled to income, and that the fact that the payment in the case of *MacIver* (1) was not cash but was shares did not affect the principle that what the trustees had received was income and not capital. There was no question of capitalisation by the company. There was merely a handing over to the trustees of a block of ordinary shares which were in consideration of their giving up of all right to the arrears of dividend on the preference shares, and I was unable to see what real difference there was in such a case as that from the case where the payment was made in cash. It seemed to me in that case that it could make no difference that the shares which were handed over to the trustees, had in fact been contributed by the holders of the ordinary shares in the company. So far as the trustees in that case were concerned they were getting shares in exchange for their right to have the past dividends paid, and I was of the opinion that, on the authority of *Re Wakley* (2) those shares must be appropriated to the persons entitled to income and not to capital.

But in the present case there is this difference, that part of the holding of the trustees is of ordinary shares in the company. The trustees of both these settled shares hold both ordinary and preference shares, and, as a result of the scheme which was duly approved by the court, after the necessary majorities had accepted it, the ordinary shares were reduced from their nominal value of £1 shares to 6s. 8d. shares, and the trustees have in their hands a large block of the ordinary shares of the company which they have received in exchange for the rights, or the inchoate rights which the preference shareholders had to receive the past dividends.

Under these circumstances it is said that this case differs wholly from *MacIver's* case (1). Here, it is said, there is in the hands of the trustees a large block of shares which, so far as these trusts are concerned, have been contributed, I think that is the way it is put, contributed by the ordinary shareholders, and therefore, to some extent, by the persons interested in capital under these trusts. And that, although the persons entitled to income have an inchoate right to past dividends which is being given up, it is not equitable that these persons who are entitled to income should receive the whole of these shares, the case being one where the trustees have these shares in their hands, it is for the court to apportion these shares so as to produce some equitable result as between capital and income, so that it cannot be said that income has profited at the expense of capital.

It seems to me that it is necessary to bear in mind certain facts in connection with this case. In the first place this is not a scheme which was put forward by the trustees or by any of the beneficiaries themselves. Nor was it, as I understand it, a scheme which the trustees as holders of these shares could have prevented being given effect to, because the other shareholding was sufficiently large to enable the scheme to be passed, and the scheme was in fact passed and approved by the court. It must also be borne in mind that this is not a case where the trustees are seeking the direction of the court as to how they should act in any particular circumstances. If this was a case where the trustees either were putting forward a scheme or being asked to participate in a scheme which they could either refuse or accept as they thought fit, and the trustees, feeling the difficulty of the rights of capital and income, thought it proper to come to the court for directions, it might yet be that the court would think that, if the trustees were to be directed to give effect to some arrangement which might prejudice capital, the liberty so to act should only be given upon terms that the rights as between capital and income were properly adjusted. Here no application was made to the court for directions by the trustees. It may well be that no such direction would have been useful under the circumstances. The scheme was put before both classes of shareholders in the company and was accepted by them by a sufficient majority. The scheme was then submitted to the court and was approved by the court, and thereupon became binding upon all persons who were shareholders in the company when the scheme was approved. As a result of the scheme a large block of ordinary shares has come into the hands of the trustees as part of the scheme and in exchange for the rights of the preference shareholders to arrears of dividend.

In my judgment it is not possible in this case to say that the trustees, having these shares in their hands are bound to treat them as being something which represents partly capital and partly income, and which

therefore must be apportioned in some way so as to produce equality, or to prevent injustice to one side or the other. This is an arrangement for which the trustees were not responsible, which has been forced upon them as it were by the arrangements which the company has made with the approval of the court and the approval of the necessary majority of the shareholders, and as a result of it, the trustees having these moneys in hand. It seems to me that *prima facie* they hold them as part of income to which those persons who are entitled to income are entitled. If *MacIver's* case (1) was rightly decided, and I act on the assumption that it was rightly decided until a court of higher jurisdiction has said it is wrong, I am not able myself to see what distinction there really is between that case and this. The trustees have in their hands these ordinary shares, and then, as a result of an arrangement the nominal value of the ordinary shares has been reduced. None the less the trustees have in their hands shares which represent past dividends and these shares, *prima facie* at any rate, must be treated as income and belong to the persons who are entitled to income. In my judgment it is really a fallacy to say that the shares represent partly income and partly capital, because in fact they represent the price which was paid for giving up the right to the arrears of dividend on the preference shares. Once one comes to the conclusion that the preference shareholders, that is to say in this case the persons entitled to income, have a legal right to receive these ordinary shares, whatever the source of them (and of course, it is not strictly correct to say that the shares come out of capital of the trust estate, they come out of the whole of the ordinary shares which have been surrendered or given up by the holders of the £1 ordinary shares of the company), once one comes to that conclusion, as I think I must, if I am to be consistent with the decision in *MacIver's* case (1), then the shares which the trustees have received as a result of this scheme are income, and belong to the tenant for life, and there can be no possible room for any other arrangement under which they do not pass to the tenants for life, but are in some way apportionable between capital and income. The court has, as I apprehend it, no jurisdiction to say to a beneficiary who has become entitled legally to some property: "You must give up the whole or some part of that property because if you do not some injustice may be done to other persons interested in the trust." In my judgment the persons who have a legal right clearly are entitled to stand upon their legal rights and say: "We give up nothing." In this case I cannot see any ground for suggesting that what the trustees have in their hands can be properly the subject matter of some scheme under which part of the shares are given to income and part of them are given to capital. They are, in my judgment income, and only income, and they are none the less income because they have been contributed to some extent as part of a general scheme out of what is capital of the

trust fund. If it were necessary to direct any scheme of apportionment or adjustment of rights I myself do not wholly appreciate on what principle this could proceed. The effect of the scheme in this case has been to reduce the nominal value of the ordinary shares from £1 to 6s. 8d., but when one takes the actual value of the ordinary shares it is quite obvious that the scheme has been most beneficial to the ordinary shareholders. All the ordinary shareholders, instead of having in front of them large dividends due for unpaid dividends on the preference shares, which completely prevent them getting any dividend themselves, have now got shares which are wholly free from that debt and have consequently greatly risen in value. And unless it is possible to say upon what principles any apportionment of these shares is to be made, it seems to me it must necessarily follow from that fact alone that there can be no apportionment, and that the persons entitled to income are now in a position to say: "We have got a legal right to these shares and, that being so, there can be no room, and the court has no jurisdiction to order us to give up any of these rights." I am not satisfied that the result of the scheme has been to cause any real loss to capital in this particular case. I propose therefore to determine that the shares in question are income and should be distributed as such.

In my judgment there is no room here for the Apportionment Act and accordingly I make a declaration to that effect. The costs of all parties as between solicitor and client to be paid as to one moiety out of each settled fund.

Solicitors: *Emmet & Co.*, agents for *Sanders, Locker & Parish*, Birmingham (for all parties except the third defendants); *Ridsdale & Son* (for the third defendants).

[Reported by C. M. YOUNG, Barrister-at-Law.]

WHITTLE v. EBBW VALE, STEEL, IRON & COAL CO., LTD.

[COURT OF APPEAL (Slessor, L.J., Mackinnon and Goddard, J.J.), July 15, 16, 1936.]

Master and Servant—Workmen's compensation—Death due to disease—Heart disease—Acceleration due to employment.

The deceased was a grease boiler, aged 61, and was at the time of the accident suffering from heart disease. His doctor said in evidence that he did not advise him to go back to work, but he insisted upon going. The doctor also gave evidence that he might have died at any moment, and any strain or stooping was prejudicial to him. He was seen about his work at 5.20 a.m., and found dead at 5.40 a.m., lying over a water tank, his face being covered with water. The post-mortem examination showed that he died of heart disease. Upon these facts the county court judge held that the work upon which the deceased was engaged contributed to and accelerated his death and applying the principles in *Treloar's* case (2) and in *Partridge Jones & John Paton, Ltd. v. James* (3), he made an award in favour of the dependants:—

HELD: the case was distinguishable from *Barnabas v. Bersham Colliery Co.* (5), and the county court judge had applied the right principle, as there was evidence that the employment contributed to the death of the deceased.

EDITORIAL NOTE. The cause of the death in this case cannot be known with certainty since there is no evidence of how the deceased met his death. The question therefore arises whether upon the known facts there is an equal degree of probability that the death was due to the employment or whether that is the more probable conclusion in the view of a reasonable man. The matter here would be practically covered by the highest authority, but for the case of *Barnabas v. Bersham Colliery Co.* (5), a decision of the House of Lords in 1910, where it was held that the evidence was equally balanced. The material facts here are that the deceased suffered from advanced heart disease; he was seen at his work apparently in his ordinary health and then twenty minutes later was found dead in a position which would suggest he was carrying out his duties.

AS TO INFERENCE FROM FACTS. see HALSBURY, 1st Edn., Vol. 20, Master and Servant, pp. 169, 170, para. 360, and FOR CASES, see DIGEST, Vol. 34, pp. 343, 344, Nos. 2770-2774. AS TO DEATH FROM DISEASE, see HALSBURY, 1st Edn., Vol. 20, Master and Servant, pp. 162, 163, para. 342, and FOR CASES, see DIGEST, Vol. 34, pp. 344-347, Nos. 2775-2796.]

Cases referred to:

- (1) *Lancaster v. Blackwell Colliery Co., Ltd.* (1919), 12 B.W.C.C. 400; 34 Digest 324, 2647.
- (2) *Falmouth Docks & Engineering Co., Ltd. v. Treloar*, [1933] A. C. 481; 26 B.W.C.C. 214; Digest Supp.
- (3) *Partridge Jones & John Paton, Ltd. v. James*, [1933] A. C. 501; 25 B.W.C.C. 92; 26 B.W.C.C. 277; Digest Supp.
- (4) *Clover, Clayton & Co., Ltd. v. Hughes*, [1910] A. C. 242; 3 B.W.C.C. 275; 34 Digest 273, 2316.
- (5) *Barnabas v. Bersham Colliery Co.* (1910), 3 B.W.C.C. 216; 4 B.W.C.C. 119; 34 Digest 325, 2656.
- (6) *Muscroft v. Stewarts & Lloyds, Ltd.* (1928), 21 B.W.C.C. 274; Digest Supp.
- (7) *Hawkins v. Powells Tillery Steam Coal Co., Ltd.*, [1911] 1 K.B. 988; 4 B.W.C.C. 178; 34 Digest 323, 2646.

- (8) *Maxwell v. Ruabon Coal & Coke Co., Ltd.* (1916), 10 B.W.C.C. 138 ; 34 Digest 334, 2710.
- (9) *McFarlane v. Hutton Brothers. (Stevedores), Ltd.* (1926), 20 B.W.C.C. 222 ; Digest Supp.
- (10) *Stewart v. Wilson & Clyde Coal Co.* (1902), 5 F. (Ct. of Sess.) 120 ; 34 Digest 270, 2293 (iii).

APPEAL from an award of His Honour JUDGE L. C. THOMAS given at Tredegar County Court on Mar. 31, 1936. The facts are set out in the judgment of SLESSER, L.J.

W. Shakespeare and G. Parsons for the appellants.

E. W. Cave, K.C., and W. M. Davies for the respondent.

SLESSER, L.J. : This is a difficult case and it has been very fully argued, but as the court has come to a clear conclusion upon it, we do not think it is necessary to reserve it for further consideration. The question which arises upon this appeal is whether the county court judge was or was not entitled to draw an inference of fact from certain facts which appeared in the evidence. The principles upon which he has to proceed are very clearly stated by LORD BIRKENHEAD, L.C., in the case of *Lancaster v. Blackwell Colliery Co., Ltd.* (1) at p. 406, where he says this :

The principles which have to be applied to facts like these are now well settled ; they have been declared on numerous occasions by your Lordships and they may be very easily summarised. If the facts which are proved give rise to conflicting inferences of equal degrees of probability so that the choice between them is a mere matter of conjecture, then, of course, the applicant fails to prove his case, because it is plain that the onus in these matters is upon the applicant. But where the known facts are not equally consistent, where there is ground for comparing and balancing probabilities as to their respective value, and where a reasonable man might hold that the more probable conclusion is that for which the applicant contends, then the arbitrator is justified in drawing an inference in his favour.

In the present case, the county court judge has drawn an inference in favour of the dependant of the deceased workman that the accident which caused his death arose out of his employment ; and it is said on behalf of the appellants that that is no more than a mere matter of conjecture or guess, and consequently the applicant here, on the evidence, has failed to satisfy the onus of proof which is upon her to show that the deceased died as a result of an accident arising out of the employment. The facts of the case proved in evidence, as far as they are material, are as follows : The deceased, a man called Charles Whittle, was employed by the company as what is known as a grease boiler. His duties were, first of all to see to the fires ; as to that there is no very definite evidence as to how much attention he had paid on the day of his death to seeing to the fires, but perhaps his more important duty as a grease boiler was to take to the boiler the commodity which is used for the purpose later on, as I understand, of lubrication, to put the batch of hot grease after it

has been heated into frames and put it on the floor ; there it is allowed to cool and is cut up and divided into blocks, and then the blocks are carried cut to a tank of water to cool, the whole process taking from three quarters of an hour to one hour. It is in evidence that he is in a stooping attitude substantially during the whole process, and that he deals with three or four batches during the shift, and as far as the firing is concerned that consists of throwing the ashes out and fetching the coal. The average weight of the stuff to be loaded is 15 to 20 pounds, and he would have to lift it in order to put it into the pot. These men work in various shifts, and this particular man on the occasion in question came on to work on the day on which he died and would normally have continued to work through the night until 6 o'clock in the morning. The last person to see him alive was a Mr. Martin, who is a furnace man ; he was working on the same shift, and he says that he was with the deceased at 5.15 a.m. when they walked—I think it must be “talked,” although it says “walked” in the note, and the judge says “talked” in the shorthand note—and he left him at 5.20. At 5.40 a Mr. Edward Thomas, who is a foreman in the packing shed of the Ebbw Vale company, found the deceased lying over the water tank, his face being covered with water. The water tank, as I have already said, is the place where he would normally go in the last stage of his operations, that is to say, when the grease had cooled and had been cut into blocks, it was carried to the water tank ; that would be the last process of all which he would be employed to do of the four processes during the shift, and he would normally end his work at the water tank, which was the place where in fact he was found some twenty minutes before the time when he would ordinarily have ceased his work.

So much for the history of the casualty, but one has to have regard to the medical condition of this man. That evidence was given by a Dr. Partridge. Mr. Whittle was a panel patient, and the doctor says that on Jan. 20, Whittle had complained of pain in the region of the heart and he came to the conclusion that his heart was in a bad state, and that Whittle was told by his doctor to rest. He says : “ I did not advise him to go back to work, but he insisted upon going. He was a man of 61 years of age.” There was a post-mortem examination, and on the post-mortem it was discovered that the cause of death was the condition of the coronary arteries, and that he did, as the learned county court judge found, die of that condition. Dr. Partridge says the work he was called upon to do when he died was an excessive strain :

He was not fit for a job involving continuous hard work. He was a weak man by reason of his cardiac condition. A man with a heart like his might break down under any physical strain. The work described would have a deleterious effect on him.

In cross-examination he said :

He might have died at any moment ; he might have died in the street or in bed. Strain or stress would be the likeliest exciting cause. Stooping was very prejudicial to him. Any work would affect him in that condition. There is no evidence to connect fumes with his death. Carrying blocks would not affect him. Work was prolonged exertion, and he was not fit for work of any kind.

On that, the learned county court judge has come to this conclusion :

Although this work was not of a very heavy nature, yet he had to do a good deal of stooping. There was no evidence of any strain or really undue exertion which precipitated the death ; on the contrary, the workman after he had done his work did, as the husband of the applicant in another case of very similar facts did—he stood off for a time, talked and joked, but shortly afterwards he died, and the only question in the case is one which is very familiar—as to whether it can be said that the work which he did contributed to or accelerated his death. The man undoubtedly had a very bad heart, as has happened in many of these cases, and he might have died at any time. The question is on the evidence whether as a matter of fact I can say that the work which he did contributed to or accelerated his death. That must depend upon the evidence. The principles have been laid down so often that it would be tedious for me to recapitulate them. It appears to me in this particular case that the evidence of the doctor is decisive of the matter. He knew the work the man was doing ; he practically forbade him to go to work ; he said the continual stooping which he had to do was prejudicial to him ; that any work would affect one in the condition in which he was, and that he was of opinion that the “prolonged exertion” to which he was subjected, which might not have been very heavy, did accelerate or contribute to his death. He said in particular that any kind of strain or stress would affect the condition of his heart, and on that evidence it appears to me I must find that the work did in fact cause his death.

Then in the note appended to the evidence, he says this :

In this case I have applied the principles laid down in *Treloar's* case (2) and *Partridge Jones & John Paton v. James* (3). I accept the evidence of Dr. Partridge, and find as a fact that the work on which the workman was engaged contributed to and accelerated his death.

There is one feature about this evidence which perhaps differentiates it from some, if not all, of the cases, and that is that it does appear, not perhaps entirely definitely on the learned judge's note as taken, but certainly as stated in the reasons for his judgment, that the doctor knew what the man was doing and practically forbade him to go to work. Dr. Partridge says : “I did not advise him to go back to work, but he insisted on going” ; that, in itself, seems to me a very material fact, that the learned county court judge has paid attention to the fact that the doctor had considered this man's condition and had advised him not to go back to his work ; the doctor must have formed the opinion that the work was perilous for him to do.

A number of cases was cited to the learned county court judge, and it is the number of those cases, if I may say so with respect, and the difficulty of reconciling some of the opinions expressed in them, which has caused

me to describe this case as a difficult one. I think it is necessary, while confining my consideration to what I believe to be the material cases, to examine some of those authorities in order to consider how the law stands at the present time. The first case which I propose to consider is the case of *Clover, Clayton & Co. v. Hughes* (4), which is mentioned in nearly all of these cases. That, if I may say so, was a comparatively simple case to decide, because there :

A workman suffering from an advanced aneurism of the aorta was doing his work in the ordinary way by tightening a nut with a spanner. This ordinary strain caused a rupture of the aneurism, resulting in death. The county court judge on conflicting evidence found that the workman's death resulted from personal injury by accident within the meaning of the Act. Held (LORD ATKINSON and LORD SHAW dissenting), that there was evidence on which the county court judge was justified in so deciding.

Part of that case, indeed the greater part of it, was concerned in the consideration of what constituted an accident, and it was held that what happened there was properly to be described as an accident, that is to say, that the learned judge was entitled to regard a rupture as an accident, and it was an untoward event within the meaning of that phrase as it appears in the earlier authorities. That, of course, was only one matter which was considered ; they pass on to consider whether the accident, so found, arose out of the employment, and there follows this important phrase that has been so often quoted on p. 281 in the opinion of LORD LOREBURN, L.C. :

It may be that the work has not, as a matter of substance, contributed to the accident, though in fact the accident happened while he was working. In each case the arbitrator ought to consider whether, in substance, as far as he can judge on such a matter the accident came from the disease alone, so that whatever the man had been doing it would probably have come all the same, or whether the employment contributed to it. In other words, did he die from the disease alone or from the disease and employment taken together, looking at it broadly ? Looking at it broadly, I say, and free from over nice conjectures : Was it the disease that did it or did the work he was doing help in any material degree ?

In that case there was really no very great difficulty in answering that question, because the county court judge had held that the strain in fact caused the rupture, and the strain was the specific act of tightening up this nut with a spanner, and it was for that reason that I called that case, if I may use the expression, a comparatively simple one.

The matter does not rest there, because very shortly afterwards there came before the House of Lords another case, the case of *Barnabas v. Bersham Colliery Co.* (5), on Nov. 9, 1910, the case of *Clover, Clayton & Co. v. Hughes* (4) being on Mar. 14, 1910. In the case of *Barnabas v. Bersham Colliery Co.* (5) it was held that the evidence was equally balanced either for or against the accident, and, therefore, in accordance.

with what was later indicated by LORD BIRKENHEAD, L.C., in the case of *Lancaster v. Blackwell Colliery Co., Ltd.* (1), to come to a conclusion in favour of the workman would merely be the result of a conjecture or a guess. It is important to examine what happened in the case of *Barnabas v. Bersham Colliery Co.* (5). There the headnote reads :

A collier died of apoplexy during working hours in a mine. The majority of the doctors said that his arteries were in a very diseased condition, and that apoplexy might have come upon him when asleep in bed, or when walking about, or when over-exerting himself. The collier's work on that day was to build a "pack" ; but there was no evidence that apoplexy came upon him when he was incurring a strain. Held, as the evidence, as to the cause of death, was equally consistent with an accident and with no accident, and the onus of proving that it was due to accident rested on the applicants, in this case that onus had not been discharged by them—

and they could not recover. LORD LOREBURN, L.C., considering the matter at p. 122, says this :

The learned county court judge says that the deceased died "from apoplexy, brought on by strain, while engaged in the heavy work of building the 'pack'." Was there any evidence to support the finding that the apoplexy was brought on by the strain? The only piece of evidence that has been referred to is this, that the doctor says that "the man's arteries, especially the arteries of the brain, had degenerated, and great effort in doing anything might cause them to rupture; on the other hand, they might have ruptured while he was asleep in bed. The arteries were in such a state, they might rupture with slight exertion, or with no exertion at all."

In the Court of Appeal, whose decision was upheld, the evidence is rather more fully stated, and it says on p. 218 :

The county court judge came to the conclusion that the workman died not as the result of a blow or fall, but from apoplexy brought on by the strain while engaged in the heavy work of building "the pack."

On that, COZENS-HARDY, M.R., makes this essential distinction, at p. 221, speaking of the case of *Clover, Clayton & Co. v. Hughes* (4) :

In that case there was proof of what the workman was doing at the moment of the accident ; he was tightening a nut with a spanner—an action which obviously involved some exertion—when a blood vessel broke. There was a strain occurring in the ordinary discharge of the workman's duties producing this rupture. But here in this case we are entirely in the dark. There was no particle of evidence that this collier incurred any strain, even in the proper and limited sense of that word, at the time when he was seized with apoplexy.

If the House of Lords are to be taken as grounding their opinion upon the same principles as those of the Court of Appeal, and I see no reason to think the contrary, then it would appear that, had the law stood as it then appeared to stand, the argument which Mr. Shakespeare has here addressed to us, namely, that there is no definite evidence, as there was in the case of *Clover, Clayton & Co. v. Hughes* (4) to connect the alleged strain with the death, would have gone far to support the

view that the learned county court judge was not entitled here to find in favour of the dependant. But, unfortunately for Mr. Shakespeare and Mr. Parsons, the law has been further considered since that time. It is true to say that in the case of *Muscroft v. Stewarts & Lloyds, Ltd.* (6), the case of *Barnabas v. Bersham Colliery Co.* (5) was applied. That was a case where :

A miner, who was known to be suffering from valvular disease of the heart returned to work against his doctor's advice—

and we have that common factor here, that the doctor had advised this man not to return to work—

His condition was such that he was liable to collapse or sudden death at any moment. He went down the mine at 10.30 p.m. and was alive and apparently well at 3 a.m. At 4 a.m. he was found dead in his stall, lying back as though asleep. There was no evidence of any fall of roof, and he had no pick in his hand. He was alone at the time of his death, and there was no evidence of what the man was actually doing. The county court judge inferred that death had been caused by a strain at work.

And it was held by this court, following, as they thought, the case of *Barnabas v. Bersham Colliery Co.* (5), that there was no evidence that death had resulted from any injury at work. The county court judge in that case put his reasons thus at p. 276 :

Deceased's heart was in a very dangerous state. He was doing work far heavier than he was capable of doing. Every blow of his pick, every lift of coal into a tub may be said to have brought death nearer and in the end it came. The weakened heart, long over-worked, ceased beating, and deceased died suddenly.

As I think LORD HANWORTH, M.R., says in his judgment, this matter is really decided against the workman by the case of *Barnabas v. Bersham Colliery Co.* (5). He says on p. 281, speaking of the case of *Barnabas v. Bersham Colliery Co.* (5) :

That is a case where it was held to be insufficient evidence, and it would appear that, strong as the inference may be—or, perhaps, the better way to put it is this—easy as it is to reconstruct the picture, yet one must not reconstruct the picture in a certain way unless the evidence fully justifies that picture.

Then LORD HANWORTH, M.R., also cites the case of *Hawkins v. Powells Tillery Steam Coal Co.* (7), where also it was held that in the case of a man who collapsed at his work and died, and where the evidence was that this heart was in a bad state, that the dependants had not discharged the onus of proving that the accident arose out of the employment. He also mentions the case of *Maxwell v. Ruabon Coal & Coke Co.* (8), and finally sums the matter up thus in the second paragraph on p. 282 :

Those cases are illustrations of the fact that where you have a man known to have a diseased heart, whose death occasions no surprise when it occurs at any moment of the night or day, it is not possible to draw the inference that the death must

have supervened upon some work done by him, and thus discharge the onus that lies upon the claimant.

RUSSELL, L.J., as he then was, says also, at p. 288, speaking of the county court judge's finding :

I find he proceeds in his judgment to use this language : "[in either case] the deceased's heart was such that he might have died at any time." That appears to me inconsistent with the learned judge holding the view that in the case of this man to cause in him a sudden death it was necessary for violent sudden exertion to have occurred.

The next case to which our attention has been called is the case of *Falmouth Docks & Engineering Co., Ltd. v. Treloar* (2), which I think for this purpose need only be considered in the House of Lords. In that case there was some specific evidence of an act which may have been said to have caused the death ; that is to say :

A dock labourer, forty-six years of age, while helping to load a ship, gave himself a jerk when trying to steady a swinging load with his hook, but continued working. A quarter of an hour later there was a pause in the work and the workman sat down on some sacks. In order to bring another sack nearer to the place where he was sitting, he raised his hook to stick it in the sack, but in doing so fell forward and died. Death was certified as being due to myocarditis and syncope. The widow filed a request for arbitration. At the hearing aneurism of the aorta and acute dyspepsia were also put forward as possible causes of death.

As far as the Court of Appeal was concerned in that case, the Court of Appeal based their conclusion almost entirely on the specific evidence of these two identifiable strains, more particularly the latter ; but when the matter was dealt with in the House of Lords, as I read the judgment, the matter was put in a very much broader way. LORD BUCKMASTER, in terms, deals with the matter on the broader view ; he says, at p. 221, after stating the facts :

My Lords, I must say it appears to me that the learned county court judge has misunderstood what he really had to do. He was not bound to find what particular form of heart disease the man died from, nor was it necessary for him to examine in detail the exact periods of time that elapsed between the time when he had first caught hold of this swinging load and the time he died. Those things were really entirely unnecessary, because the doctor who gave evidence said in plain language that it was inconceivable that the work had no effect on the disease ; and there really was no effective evidence the other way. The original statement might be a little modified, but there is no doubt the medical evidence was all in agreement that the strain might produce his death due to either form of heart disease, subject only to this, that the doctors proceeded to measure the periods that might elapse between the result of the strain and death, according to the character of the disease. Now there is no evidence whatever that leads to the opinion that without the work this man was engaged on he, none the less, would have died of this disease. . . . If a man who is engaged in doing work, and as part of that work and in the course of it does something which he might do outside, but which, none the less, happens in the course of and arising out of his work and it

causes his death, the accident has arisen out of and in the course of his employment. I put to counsel in the course of this case an illustration which appears to me perfectly sound: Supposing a workman is engaged in putting books on library shelves and he lifts the books, and in the course of lifting the books to put them on the library shelves, owing to the fact that the action of lifting his arm causes a strain upon his heart which his heart cannot bear and he falls down dead, none the less the accident arises out of and in the course of his employment.

It might be argued here that the facts of this present case are different from those of the case of *Falmouth Docks & Engineering Co., Ltd. v. Treloar* (2), and resemble more closely those of *Barnabas v. Bersham Colliery Co.* (5), because in the case of *Falmouth Docks & Engineering Co., Ltd. v. Treloar* (2), as appears from the judgment of the Court of Appeal, there were two identifiable strains in connection with moving the sack and adjusting the hook, and there was the evidence of a doctor who said it was inconceivable that the work had no effect on the deceased; and, as LORD BUCKMASTER says, on p. 221, there was no really effective evidence the other way, and also he states:

There is no evidence whatever that leads to the opinion that without the work this man was engaged on he, none the less, would have died of this disease.

Here it is true that we have evidence to the effect that this man with this diseased heart might have died in the street or in bed, and were the matter to end with the decision in *Treloar's* case (2), it might well have been that a strong argument could have been addressed to this court that following, without qualification, the decision in *Muscroft v. Stewarts & Lloyds, Ltd.* (6), we should have said this appeal ought to be allowed.

It is important to look at the decision in the Court of Appeal in *Treloar's* case (2) for one purpose, although the general principle is stated in the House of Lords. When in the Court of Appeal it is reported, and it is important to note that the case of *Clover, Clayton & Co., Ltd. v. Hughes* (4), was before the court in that case and was considered, and also the case of *McFarlane v. Hutton Bros. (Stevedores), Ltd.* (9). That rather indicates that in the Court of Appeal at any rate the court was influenced by the fact, as appears in the judgment of LORD HANWORTH, M.R., and in my own judgment, that there was evidence of a specific strain.

Then when we come to the next case, which is the latest case in the House of Lords on this point which gives us any real guidance, the case of *Partridge Jones & John Paton, Ltd. v. James* (3), on the principles of which the learned county court judge in the present case seems to have proceeded, the difficulties begin to accumulate. There it is very important to discuss and consider the exact facts. The headnote says:

A workman, who was suffering from disease of the coronary arteries brought on by syphilis and whose condition was such that he might die from heart failure at any moment, whether working or not—

that distinguishes the case, in my judgment, from the facts of *Treloar's* case (2)—

was working as a dipper in a galvanising department. He was engaged in the operation of cleaning out the dross, which was of a laborious nature. This operation being finished, he sat down and within ten minutes died. The post-mortem examination resulted in a report that the cause of death was *angina pectoris*. There was medical evidence to the effect that the operation of drossing had accelerated the workman's death.

I find the facts of that case—although, of course, the facts of no two cases exactly agree—to be very similar to the facts of the present case. In both cases there is a finding that the man might have died at any moment; in both cases there is evidence that the work he was doing was work of a laborious nature, and that it accelerated or produced the workman's death. The only difference in the two cases that I can see is that in the case of *Partridge Jones & John Paton, Ltd. v. James* (3), the man died, as it is said, immediately, or ten minutes after, he had actually last worked; whereas in the present case there is an interval of 25 minutes; I will come to that point in a moment, I am only concerned at the moment to say that the facts seem to me to be substantially the same.

On that, the matter was twice tried; first of all it appears that the matter, having been first tried before His Honour JUDGE THOMAS on Dec. 12, 1931, the learned county court judge came to the conclusion on those facts that he was unable to find as a fact that the man suffered any strain or that the work contributed in any way to his death. This court took the view that upon that medical evidence it was not clear that the judge had rightly directed himself in law, and LORD HANWORTH, M.R., after saying that he would carefully abstain from giving any view, as the matter was to be retried, as to the opinion the learned county court judge ought to take, seems to come to the conclusion (p. 96):

Now, in the present case, the evidence of the doctors points to the work having some part in the accident, as it is to be called, from which this man died.

And he thinks, therefore, that the learned county court judge should really consider the evidence in the light of that fact. The learned county court judge said on p. 93 of the report:

It was contended on behalf of the applicant that the workman strained his heart while in the course of his employment and that such strain caused his death. I am unable to find as a fact, that the workman suffered any strain or that the work contributed in any way to his death.

The matter was sent back to be tried by another county court judge, and on that occasion, on the second hearing before His Honour JUDGE ROWLAND ROWLANDS, in 1932, the learned county court judge held that the death did result from the accident arising out of and in the

course of his employment. On that occasion regard was had to the fact that the doctors had given evidence to the effect that the work had accelerated, or might have accelerated, the death. LORD HANWORTH, M.R., discusses again the authorities, including the case of *Clover, Clayton & Co., Ltd. v. Hughes* (4), and considered also the case of *Barnabas v. Bersham Colliery Co.* (5); so that those cases were before the court. He took the view that applying the test as to whether the injury had substantially caused the death, the learned county court judge having said it was clear in the opinion of the doctors that the ordinary work accelerated his death, that the case fell within the decision in *McFarlane v. Hutton Brothers (Stevedores), Ltd.* (9), and *Clover, Clayton & Co., Ltd. v. Hughes* (4), and the rest of the court came to the same conclusion.

I only mention that by way of preliminary observation in order that one may have the exact situation clear when one considers the judgment in the House of Lords, which judgment upheld the decision of this court. LORD BUCKMASTER, who gives the leading judgment, puts the matter in this way: he deals with the argument which was used on behalf of the employer, and as he comments upon it, I think it is necessary to read that argument as it is expressed in 26 B.W.C.C. at p. 283:

Now the real case as made against the judgment appealed from is this, that, in order to establish that a man is entitled to the benefit of the Act, it is necessary to show that he has suffered an injury as the result of some definite thing that he did in the course of his work. If, in the normal course of his work, owing to the imperfect condition of his arteries or whatever other internal organ may have been diseased, he breaks down and dies, the appellants' case is that, although the work contributed to the death, that is not sufficient unless you can point to a specific injury resulting from a specific act. That would also appear to have been the view of the learned county court judge, if he had not thought that authority was too strong for him.

I think in the present case, unless I have misunderstood Mr. Shakespeare, he does not put it as high as that; he says: "You do not need to have a specific injury in the nature of a lesion, but you must still have a specific act; I say you have to show some specific connection between the work done and the death." However that may be, that argument having been so stated by LORD BUCKMASTER, he deals with it in the following terms, and will have none of it (p 283):

My Lords, whatever may have been said about the merit of that argument some twenty years ago [that would be about 1913] it appears to me it is impossible to be effectively advanced to-day, while this House, as well as all the other courts, are bound by what was done in the case of *Clover, Clayton & Co. v. Hughes* (4),

and then he sets out the facts.

This is where my trouble begins, because the case of *Barnabas v. Bersham Colliery Co.* (5), as I have pointed out, was later in date than the case of

Clover, Clayton & Co. v. Hughes (4), and in the case of *Clover, Clayton & Co. v. Hughes* (4), there was just that specific injury and specific act which the appellants in the case of *Partridge Jones & John Paton, Ltd. v. James* (3), were contending was necessary in order that the connection between the accident and the death should be established; whereas in *Barnabas v. Bersham Colliery Co.* (5), as I understand it, the essential distinction between that case and the case of *Clover, Clayton & Co. v. Hughes* (4) was that there was no specific evidence. LORD LOREBURN, at p. 122, cites what the learned county court judge had there said, and he comes to the conclusion that really in that state of facts it was equally consistent with one conclusion as with the other, and it will be remembered that that is the case where the collier died of apoplexy during working hours in the mine. LORD BUCKMASTER makes no specific reference to the case of *Barnabas v. Bersham Colliery Co.* (5), although it had been mentioned in the first application in the Court of Appeal, and he conceives himself to be bound by the decision in *Clover, Clayton & Co. v. Hughes* (4), where, as I understand it, there was specific evidence of a specific injury and a specific act. However, that may be, having quoted what LORD LOREBURN had said, and applying particularly that passage to the effect that the matter must be looked at free from over-nice conjectures, he comes to the conclusion that this case really, as I read it, was governed by the decision in *Clover, Clayton & Co. v. Hughes* (4). He goes on, however, to quote another decision in the case of *Stewart v. Wilson & Clyde Coal Co.*, (10), where LORD McLAREN said:

If a workman, in the reasonable performance of his duties, sustains a physiological injury as the result of the work he is engaged in—this is accidental injury in the sense of the statute. My Lords, with that as a guidance to this House, it seems to me that, when the learned county court judge has held that the result of the work was the failure of the blood supply resulting in *angina pectoris*, and that it was because he was engaged in doing his ordinary work under this diseased condition that this failure arose, and that the work and the disease together contributed to the death, it would be impossible to deny that that is within the actual meaning of the words in the case I have quoted.

In the light of that case it seems to me impossible here to say that the facts are not so similar to those in the case of *Partridge Jones & John Paton, Ltd. v. James* (3); we have here the finding that this man's heart was in a bad state; we have the finding, that he might have died at any time; we have also a clear statement of the learned county court judge, based on the evidence of Dr. Partridge, that first of all he had told him he ought not to go to work and:

He was not fit for a job involving continuous hard work. He was a weak man by reason of his cardiac condition. A man with a heart like his might break down under any physical strain. The work described would have a deleterious effect on him. He might have died at any moment. Strain or stress would be likeliest exciting cause. Stooping was very prejudicial to him. Any work would affect him in that

condition. There is no evidence to connect fumes with his death. Carrying blocks would not affect him. Work was prolonged exertion, and he was not fit for work of any kind.

The learned county court judge has certainly followed the decision in *Clover, Clayton & Co. v. Hughes* (4) to this extent, that he has looked at the substance of the matter free from over-nice conjectures. Whatever might have been said to be the law before the case of *Partridge Jones & John Paton, Ltd. v. James* (3), we have now no choice but to apply what the learned county court judge calls the principles laid down there to the present case, and that application must result in favour of this appeal being dismissed.

I will only add one matter. Mr. Shakespeare has drawn our attention to the fact that in the case of *Partridge Jones and John Paton, Ltd. v. James* (3), the fact was that the man died immediately, or almost immediately, after the time he had been at work. In fact, I think it was actually 10 minutes after, but it is described in the House of Lords as being "immediately," quoting the finding of the learned county court judge. In the present case, as I have said, the last man to see the deceased alive was Mr. Martin, who saw him at 5.20. According to the evidence given at the inquest, he was found dead at the tank, which was a place where he might reasonably be expected to be when doing his work, at 5.40. That seems to me to be entirely a question of fact and of degree. I think if there had been a much longer interval that might have weighed with the learned county court judge to say: "The interval is so long that I do not think in those circumstances I am satisfied that the strain caused the death."

But there can be no general principle that a man must die immediately he has received the strain; it is a question of fact to be decided on the evidence and the medical evidence. As far as this particular case is concerned, I think there are reasons why the learned county court judge was fully justified in coming to the conclusion which he did. It seems to me a matter very material for his consideration that this man was found dead within 20 minutes of the time when he would cease work in any event, at the place where he would normally end the last of the four times he had to go to the tank. The tank where he was found dead was the very place where he would complete his work; the last process he has to do is to carry the grease to the tank to cool, and that was the place where he was found. When he was talking to Mr. Martin he was working on the shift with him, and Martin does not say where they were working or exactly what process he was doing, but at any rate he was outside the grease-house at 5.40, which was almost the time when his work came to an end, and he was in the most natural place for him to be if he was continuing in the process of his work. Moreover, although

it is not for me but for the learned county court judge, the latter, among other things, may have assumed, in the absence of evidence to the contrary, that this man was lawfully fulfilling his contract which was, I suppose, to complete these various processes. There is no suggestion that he would go home, leaving the grease anywhere but in the tank, and the learned judge may have come to the conclusion that this man was actually working when he was overcome.

At any rate, I think there are several factual elements in this case which justify the county court judge in coming to the conclusion, even perhaps apart from these authorities, that this death happened in the course of his employment. There is this distinction between this case and the case of *Barnabas v. Bersham Colliery Co.* (5) that in that case the man was found having an apoplectic fit, but I do not think there is any reason to suppose that in that case at the moment when the man was found he was found in a place where he would actually have to be to do the particular work on which he was engaged; whereas in the present case the tank where he was found is the place where he would very likely be shortly before the end of his shift.

For all these reasons, I am of opinion that the learned county court judge was right and that this appeal fails.

MACKINNON, J.: I agree in the result. In the case of *Barnabas v. Bersham Colliery Co.* (5) in 1910 a miner, who had a diseased condition of his arteries, was found dead in his working hours at his place of work in the mine; clearly he had died in the course of his employment, and the learned county court judge thought he was justified and ought to infer that he died from an accident arising out of his employment, and he made an award in favour of the dependants. That decision was reversed by the Court of Appeal and the House of Lords on the ground that there was no evidence on which the county court judge could come to that decision. This case seems to me exactly the same. This man had a badly diseased heart, so that he might have died at any moment at his work or at his home, in the street or in his bed; he was found dead at his place of work in his working hours. I think it is impossible to distinguish those facts from the facts of the case of *Barnabas v. Bersham Colliery Co.* (5).

The learned county court judge in this case has made an award in favour of the dependants of the deceased. If by some happy catastrophe the reports of all the cases since that of *Barnabas* (5) had been destroyed, our task would have been simple, and I think we should have been constrained to hold, by reason of the decision in the case of *Barnabas v. Bersham Colliery Co.* (5), that this appeal must be allowed and the decision of the county court judge reversed, but the county court judge in this case has stated that he has acted upon the decision

in *Treloar's* case (2) and the case of *Partridge Jones v. James* (3), which are both decisions of the House of Lords in 1933. Having carefully examined those cases, I think the learned county court judge was justified in saying that he was authorised by those cases to come to the conclusion at which he did, even though the case of *Barnabas v. Bersham Colliery Co.* (5) would constrain him to the contrary. My *nisi prius* mind is unable to reconcile the decision in the case of *Barnabas v. Bersham Colliery Co.* (5) with that in the case of *Partridge Jones v. James* (3) or to explain how both those cases can be right. It is a task which I think can only be achieved by omnipotence or infallibility.

In those circumstances, if we followed the decision in the case of *Barnabas* (5) I think we should allow this appeal; if we followed the decision in that of *Partridge Jones v. James* (3), I think we would dismiss the appeal. The only course which seems to me to be feasible is to follow the latter case; and for the reasons which were expressed in the case of *Partridge Jones v. James* (3) I think that the learned county court judge was right in his decision, and this appeal fails.

GODDARD, J.: I agree, and I do so because I am quite unable to distinguish this case from the decision of the House of Lords in *Partridge Jones v. James* (3). It seems to me that when one is considering an authority or a series of authorities the task which the court has to do is to try to find the principle which is laid down and then to see whether the principle is applicable to the facts of the case under review. It is not a question as to whether the two sets of facts are identical, because they never are, but whether the principle laid down in the authority is applicable to the facts of the case under consideration, or whether or not the facts of the case at present under consideration differ so much from those of the case cited that the principle is one which is not applicable to the other. The principle which I extract from the case of *Partridge Jones v. James* (3) seems to me to be this: the House of Lords have decided that where a man in a diseased condition dies, and it is found that the disease and the work together contribute to his death, then his death results from accident within the meaning of the Act. The only suggested distinction between this case and the case of *Partridge Jones v. James* (3) is that in *Partridge Jones v. James* (3) the county court judge found as a fact that the man was in distress at the moment he left his work and came off the stage and died ten minutes afterwards; whereas in this case we know that a man whose arteries and heart were in precisely the same condition—although, I think it is fair to say, not from the same cause as in *James' case* (3)—was seen alive at his work or at the place where his work was carried out at 5.25 and is found dead at or near a place where he has to work at 5.40. Then there comes the medical evidence that the work which

this man was engaged in doing was work which was wrong for a man in that state of health to be doing and could not be otherwise than detrimental to him.

In those circumstances, it seems to me that the county court judge had no option but to find that the work contributed to his death. He does not have to find that the work was the proximate cause of the death, but that the work and the disease together contributed to the death; and that is a decision which is binding on this court. Therefore I see no way out of holding that there was evidence here upon which the learned county court judge could make this finding, and I go further and say that in my view of this case I think the learned county court judge was right in holding in the way he did.

The only other observation I wish to make is to say that I entirely agree with the other members of this court in the difficulty they feel in reconciling the case of *Barnabas* (5) with the later cases in the House of Lords; but in view of the decision in *James'* case (3) it does seem now that the case of *Muscroft v. Stewarts & Lloyds, Ltd.* (6) in this court can no longer be regarded as being a binding authority, at any rate to the full extent of that decision; it seems to me it must be materially modified in the light of the decision in *Partridge Jones v. James* (3).

Appeal dismissed with costs.

Solicitors: *Furniss, Stephen & Co.*, agents for *A. J. Prosser*, Cardiff (for the appellants); *Russell Jones & Co.*, agents for *Edward Roberts*, Dowlais (for the respondent).

[Reported by FRANK ROWE, Esq., Barrister-at-Law.]

SIM v. STRETCH.

[HOUSE OF LORDS (Lord Atkin, Lord Russell of Killowen and Lord Macmillan), **June 23, 25, July 22, 1936.**]

Libel—Telegram—What words are reasonably capable of defamatory meaning—"The money you borrowed"—Borrowing from maidservant—Innuendo.

The plaintiff's housemaid re-entered the service of the defendant on Apr. 12, 1934. On that date the defendant addressed and sent a telegram to the plaintiff containing the following words: "Edith has resumed her service with us to-day. Please send her possessions and the money you borrowed, also her wages to Old Barton.—Sim." The plaintiff claimed damages for libel, alleging that these words were defamatory, and further that by them the defendant meant and was understood to mean that the plaintiff was in pecuniary difficulties, that by reason thereof he had been compelled to borrow and had in fact borrowed money from his housemaid, that he had failed to pay her her wages, and that he was a person to whom no one ought to give any credit. The defendant denied that the words were reasonably capable of a defamatory meaning or of any of the meanings ascribed to them in the innuendo:—

HELD: the words complained of were not reasonably capable of a defamatory meaning, and judgment should therefore be entered for the defendant.

[EDITORIAL NOTE.] The criterion by which words are to be considered capable of being defamatory has generally been regarded as settled by authority of long standing. The definition generally laid down is that the words expose the plaintiff to hatred, ridicule and contempt. This definition is here thought by LORD ATKIN to be probably too narrow. In the present case he proposes the test: would the words tend to lower the plaintiff in the estimation of right-thinking members of society generally? This, of course, is not a test of universal application, because one has to consider the person or class of persons whose reaction to the publication is the test of the wrongful character of the words used. This qualification, however, would only seem to require that there should be substituted for "right-thinking members of society generally," the person or class of persons whose reaction to the publication forms the test of the defamatory character of the words.

FOR THE LAW ON THE POINT, see HALSBURY, Hailsham Edn., Vol. 20, pp. 395, 396, paras. 483-485, and FOR CASES, see DIGEST, Vol. 32, pp. 17-22, Nos. 78-129.]

Cases referred to:

- (1) *Watkin v. Hall* (1868), L.R. 3 Q.B. 396; 32 Digest 96, 1272.
- (2) *Nevill v. Fine Art & General Insurance Co.*, [1897] A.C. 68; 32 Digest 72, 1010.
- (3) *M'Cann v. Edinburgh Roperie & Sailcloth Co.* (1889), 28 L.R. Ir. 24; 32 Digest 77, 1073 (iii).
- (4) *Beswick v. Smith* (1907), 24 T.L.R. 169; 32 Digest 27, 167.
- (5) *Clay v. Roberts* (1863), 8 L.T. 397; 32 Digest 24, 145.

APPEAL from an order of the Court of Appeal (GREER and ROCHE, L.JJ., SLESSER, L.J., dissenting) affirming the verdict and judgment given in favour of the plaintiff for £250 damages on the trial of the action before

TALBOT, J., and a common jury. The plaintiff was also awarded £25 damages for the defendant's malicious enticement of the housemaid from the plaintiff's service, but the defendant did not appeal against this part of the verdict and judgment.

The facts and the arguments are set out in the judgment.

G. O. Slade and *Neville Faulks* for the appellant.

J. P. Eddy, K.C., and *F. H. Lawton* for the respondent.

LORD ATKIN: My Lords, this appeal reaches your Lordships' House in litigation arising out of a quarrel between neighbours residing at Cookham Dean, and concerns the vicissitudes of a domestic servant, Edith Saville, whose fortune it was to be employed at successive times by both plaintiff and defendant. When the story opens she was employed temporarily as general maid by the defendant at his house, "Old Barton." She had formerly been employed by a Mrs. Sterne at another house, "The Twigs," situate a short distance from "Old Barton." Early in 1934 the plaintiff bought "The Twigs" from Mrs. Sterne. The plaintiff's wife met Edith Saville at "The Twigs" in the course of taking over the house and arranged with her to come back as maid to "The Twigs." It appears that this arrangement did not meet with the approval of the defendant's wife, but Edith took up service with the plaintiff and his wife at "The Twigs" on Mar. 15, 1934, as from Mar. 8. On Apr. 8, when a month's wages were due, they were paid to the servant, but the plaintiff suggested that she should put the money in the Post Office Savings Bank. On Apr. 12, in the morning, the plaintiff and his wife went to Maidenhead, about three miles away, to shop, intending to deposit the money in the bank. Whether they had retained it or not for that purpose in the meantime did not appear. While they were away the defendant appeared in "The Twigs" drive, called Edith out, walked back to "Old Barton" with her, then took her with Mrs. Stretch in their car to "Georgian House" in Maidenhead where the defendant's father lived. The party seem to have stayed there till Apr. 15, when they all returned to "Old Barton." Edith remained in the service of the defendant, and was there at the time of the trial. She gave evidence on behalf of the plaintiff. When she left "The Twigs" on the 12th there was no other servant in it, and the plaintiff and his wife returned to find the house deserted and Edith missing. About one o'clock that day the defendant dictated to the post office at Maidenhead the following telegram: "Stretch, The Twigs, Cookham Dean. Edith has resumed her service with us to-day. Please send her possessions and the money you borrowed also her wages to Old Barton. Sim." This was duly despatched to the post office, Cookham Dean, which is in a village shop, and was received by the plaintiff soon after despatch. On May 1 the plaintiff commenced the

present action, alleging two causes of action: (1) that the plaintiff had maliciously enticed from his service Edith Saville; (2) libel contained in the telegram. The case was tried in Feb., 1935, before TALBOT, J., and a common jury. On the first cause of action the jury found a verdict for the plaintiff for £25 damages. There was abundant evidence to justify the verdict, and there has been no appeal from it. On the alleged libel the jury found a verdict for the plaintiff for £250, and in this respect there was an appeal to the Court of Appeal, which has now reached this House. Before dealing with the appeal it is necessary to explain the reference in the telegram to "money borrowed." It appears that at the end of March, "a week just before Easter," which that year fell on Apr. 1, Mrs. Sim had been away for a week. She had left money with Edith to pay the books, but had arranged on Edith's suggestion that anything over Edith should pay out of her own money. Apparently Edith paid two small items amounting to 14s., which sum was outstanding on Apr. 12, and was in fact paid on Apr. 15.

The statement of claim, after alleging publication of the words of the telegram to the officials of the post office whose duty it was to transmit and deal with the telegram, alleged in para. 7:

By the said words the defendant meant and was understood to mean that the plaintiff was in pecuniary difficulties, that by reason thereof he had been compelled to borrow and had in fact borrowed money from the said housemaid, that he had failed to pay the said housemaid her wages and that he was a person to whom no one ought to give any credit.

At the close of the plaintiff's case counsel for the defendant submitted that the words were incapable either of the meaning alleged in the innuendo or of any defamatory meaning. The learned judge rejected the submission, and counsel for the plaintiff urged the innuendo before the jury as he has done both in the Court of Appeal and in your Lordships' House. My Lords, it appears to me that the alleged innuendo is fantastic and that the words used are in their ordinary meaning incapable of being understood by reasonable persons as conveying an imputation upon the plaintiff's financial credit. It was, in my opinion, the duty of the judge so to hold, and to withdraw the count alleging the innuendo from the jury. It is well settled law since the decision in *Watkin v. Hall* (1), at p. 402, founded on the Common Law Procedure Act, 1852, s. 61, that a statement of claim alleging an innuendo is to be treated as containing two counts, one alleging a libel with the meaning alleged in the innuendo, the other alleging the same libel with the ordinary meaning that the words bear. Even though the words in their ordinary meaning were capable of being defamatory it would have been a grave question whether the defendant in the circumstances would not have been entitled to a new trial, both counts

having been left to the jury. In the view that I believe all your Lordships take, that the words in their ordinary meaning are incapable of being defamatory, it became unnecessary to decide this question and counsel for the plaintiff was not heard upon it. I mention it to indicate that the point has not been overlooked, and to preclude any suggestion that the decision in this appeal implies approval of the course taken at the trial in this respect.

The question, then, is whether the words in their ordinary signification are capable of being defamatory. Judges and textbook writers alike have found difficulty in defining with precision the word "defamatory." The conventional phrase exposing the plaintiff to hatred, ridicule and contempt is probably too narrow. The question is complicated by having to consider the person or class of persons whose reaction to the publication is the test of the wrongful character of the words used. I do not intend to ask your Lordships to lay down a formal definition, but after collating the opinions of many authorities I propose in the present case the test: would the words tend to lower the plaintiff in the estimation of right-thinking members of society generally? Assuming such to be the test of whether words are defamatory or not there is no dispute as to the relative functions of judge and jury, of law and fact. It is well settled that the judge must decide whether the words are capable of a defamatory meaning. That is a question of law: is there evidence of a tort? If they are capable, then the jury is to decide whether they are in fact defamatory. Now, in the present case it is material to notice that there is no evidence that the words were published to anyone who had any knowledge at all of any of the facts that I have narrated above. There is no direct evidence that they were published to anyone who had ever heard of the plaintiff. The post office officials at Maidenhead would not be presumed to know him, and we are left without any information as to the officials at Cookham Dean. The plaintiff and his wife dealt at the shop at which was the sub-post office, but there is no evidence that the shopkeeper was the telegraph clerk; the probability is that he was not. It might, however, be inferred that the publication of the telegram at Cookham Dean was to someone who knew the plaintiff. What would he or she learn by reading the telegram? That Edith Saville had been in the plaintiff's employment; that she had that day entered the defendant's employment; and that the former employer was requested to send on to the new place of employment the servant's possessions together with the money due to her for money borrowed and for wages. How could perusal of that communication tend to lower the plaintiff in the estimation of the right-thinking peruser who knows nothing of the circumstances but what he or she derives from the telegram itself. The defamatory imputation is said to be in the words "the money you borrowed," coupled with the request for

the return of it sent in a telegram. It was said by the learned judge at the trial and accepted by the two members of the Court of Appeal who affirmed the judgment that the words were capable of conveying to anybody that the plaintiff had acted in a mean way borrowing money from his own maid and not paying her as he was required to and required to by telegram and also withholding her wages. With the greatest respect, that is imputing to the words a suggestion of meanness both in borrowing and in not repaying which I find it impossible to extract from their ordinary meaning. The sting is said to be in the borrowing. It happens that the phrase is substantially true. I myself have no doubt that if we were merely regarding legal technicalities the transaction which I have described as to the 14s. which was still unpaid could be covered by an indebitatus count for money lent as well as for money paid. In substance and in fact a justification of money borrowed would have been made out. But I am at a loss to understand why a person's character should be lowered in anyone's estimation if he or she has borrowed from a domestic servant. I should have thought it such a usual domestic occurrence for small sums to be advanced in such circumstances as the present, and with the assent of everyone concerned to be left outstanding for some days that the mere fact of borrowing from a servant bears not the slightest tinge of "meanness." Of course there may be special circumstances, and so large an amount may be borrowed or left so long unpaid that the facts when known would reflect on the character of the master. But to make an imputation which is based upon the existence of facts unknown and not to be inferred from the words attacked is surely exactly to come under the ban of LORD ESHER [then BRETT, L.J.] cited in *Nevill v. Fine Art & General Insurance Co.* (2), at p. 73 :

It seems to me unreasonable that, when there are a number of good interpretations, the only bad one should be seized upon to give a defamatory sense to the document.

It is not a case where there is only the choice between two reasonable meanings, one harmless and one defamatory. It is a case where there is only one reasonable meaning which is harmless, and where the defamatory meaning can only be given by inventing a state of facts which are not disclosed, and are in fact non-existent. I do not find much value in other cases where words are held to be incapable of being defamatory. Like cases on construction in other branches of law they often darken counsel rather than give light. But I think that the case cited by SLESSER, L.J., of *M'Cann v. Edinburgh Ropery Co.* (3) is of assistance where a creditor wrote to a debtor on a postcard :

If you do not remit by return the matter will be handed to our Dublin solicitors.

The court of King's Bench and the Court of Appeal both held the words

incapable of being defamatory, and the case has the double authority of PALLES, C.B., in the lower court and FITZGIBBON, L.J., in the Court of Appeal. Similar cases are *Nevill v. Fine Art & General Insurance Co.* (2), and *Beswick v. Smith* (4), where the words were held incapable of being defamatory :

H. B. is no longer in our employ. Please give him no order or pay him any money on our account.

I only cite *Clay v. Roberts* (5) because of its reference to social conditions 70 years ago. It was held that it could not be defamatory to say of a physician that he met homœopathists in consultation.

Would it be libellous, asked POLLOCK, C.B., at p. 398, to write of a lady of fashion that she had been seen on the top of an omnibus ; or of a nobleman, that he was in the habit of burning tallow-candles ? There is a distinction between imputing what is merely a breach of conventional etiquette, and what is illegal, mischievous, or sinful.

I think that no importance can be attached to the words being published by a telegram. The defendant who had acted quite unjustifiably repaired his wrong to some extent by giving immediate notice as to what had happened to the maid. It was quite natural and proper that he should ask for the maid's possessions to be sent to a named address and natural that he should in the same communication ask that the money, which in fact was due to her, should be sent to the same place. The truth of this case is that the whole matter is a trumpety affair and that the alleged libel would probably never have been heard of but for the wounded feelings caused by the improper enticement. That juries should be free to award damages for injuries to reputation is one of the safeguards of liberty. But the protection is undermined when exhibitions of bad manners or discourtesy are placed on the same level as attacks on character ; and are treated as actionable wrongs. In the present case I find myself in complete agreement with the judgment of SLESSER, L.J. Being of opinion with him that the words complained of are incapable of a defamatory meaning, I am of opinion that the appeal should be allowed. The order of the Court of Appeal should be set aside and the verdict and judgment at the trial on the issue of libel should be set aside and judgment entered for the defendant. The judgment for the plaintiffs should be reduced to £25. The plaintiff should have the general costs of the action except in so far as they have been increased by the issue as to libel, which costs the defendant should have with a set-off. There should be a certificate for High Court costs. The appellant should have the costs here and in the Court of Appeal. I move your Lordships accordingly.

LORD RUSSELL OF KILLOWEN : My Lords, I agree with the motion proposed and have nothing to add.

LORD MACMILLAN : My Lords, I also concur.

Appeal allowed with costs as restricted.

Solicitors : *Bower, Cotton & Bower*, agents for *T. W. Stuchbery & Son*, Maidenhead (for the appellant) ; *H. Pinder Brown* (for the respondent).

[*Reported by* MICHAEL MARCUS, ESQ., *Barrister-at-Law.*]

R. & W. PAUL, LTD. v. WHEAT COMMISSION.

[HOUSE OF LORDS (Viscount Hailsham, L.C., Lord Atkin, Lord Russell of Killowen, Lord Macmillan and Lord Wright, M.R.), **June 16, 18, 19, 22, July 22, 1935.**]

Agriculture—Wheat—Quota payments—Middlings—Whether flour or offal—Arbitration—Validity of bye-law—Jurisdiction of court—Whether Wheat Commission a public authority—Wheat Act, 1932 (c. 24), ss. 3, 5, 20—Public Authorities Protection Act, 1893 (c. 61), s. 1.

The Wheat Commission, as empowered by the Wheat Act, 1932, demanded quota payments from the appellants in respect of fifteen consignments of certain goods produced by the milling of wheat imported by the appellants from Germany and described by them as wheat offals known in the trade as "middlings" to be used as animal or poultry food. The Commission contended that the alleged wheat offals contained a percentage of flour in excess of that permitted by the Act, and were therefore liable to quota payment. Payment of the quota on each consignment was made under protest by the appellants who thereafter brought an action against the Commission to recover the money thus paid on the ground that the imported goods were not flour, but wheat offals exempt from liability under the Act. The Commission alleged that : (i) the consignments consisted of flour within the meaning of the Act ; (ii) no action lay against the Commission because provision was made by the Act and the bye-laws made thereunder by the Commission for the matters in dispute to be determined by arbitration to which (in accordance with the bye-law in question) the Arbitration Act, 1889, should not apply ; and (iii) the payments in respect of three of the consignments having been made more than six months before the commencement of the action, the claim for recovery thereof was barred by the Public Authorities Protection Act, 1893 :—

HELD : (i) the Wheat Act, 1932, contained no express words ousting the jurisdiction of the court, and the respondents therefore exceeded their powers by making a bye-law that every dispute as to whether any substance was flour should be determined by arbitration to which the Arbitration Act, 1889, should not apply.

(ii) the appellants having proved that all the consignments consisted of wheat offals and not of flour within the meaning of the Act, they were not liable to make any quota payments.

(iii) as the respondents were a public authority the quota payments made by the appellants in respect of three of the consignments were not recoverable on the ground that the appellants did not sue for

their recovery within six months of payment as required by the Public Authorities Protection Act, 1893.

Order of the Court of Appeal reversed, and order of ROCHE, J., restored.

[EDITORIAL NOTE.] The House of Lords was here concerned to state the legal limitations to be placed upon the powers of a statutory commission. The particular power dealt with is that of making bye-laws which oust the jurisdiction of the court. The bye-law here in question referred any dispute as to whether a substance was flour within the meaning of the Act to arbitration not subject to the Arbitration Act, 1889, and the effect of that provision would have been to prevent the Act being construed by the court. To oust the jurisdiction of the court in such a case express words in the statute are necessary.

AS TO OUSTER OF JURISDICTION OF THE COURT, see HALSBURY, Hailsham Edn., Vol. 8, p. 532, para. 1177, and FOR CASES, see DIGEST, Vol. 16, pp. 113-115, Nos. 137-148.]

Cases referred to :

(1) *Glasgow Corpn. v. Farie* (1888), 13 App. Cas. 657 ; 34 Digest 604, 12.

(2) *Hext v. Gill* (1872), 7 Ch. App. 699 ; 34 Digest 606, 41.

APPEAL from an order of the Court of Appeal (LORD HANWORTH, M.R., SLESSER and ROMER, L.JJ.) reversing an order of ROCHE, J., and dismissing a cross-appeal of the appellants. The extracts from the judgments of the Court of Appeal which occur in the judgment herein are taken from the report of those proceedings in (1935), 152 L.T. 352. The facts and the arguments are set out in the judgment of LORD MACMILLAN.

Gavin T. Simonds, K.C., and John Whyatt for the appellants.

Sir William Jowitt, K.C., and Hubert Hull for the respondents.

LORD ATKIN : My Lords, I have had an opportunity of reading the opinion which is about to be delivered by my noble and learned friend LORD MACMILLAN. I entirely agree with it, and have nothing to add.

LORD RUSSELL OF KILLOWEN : My Lords, I, too, have had an opportunity of reading and considering the opinion about to be delivered by my noble and learned friend. It so accurately expresses my own views that I find it quite unnecessary to add anything thereto.

LORD MACMILLAN : My Lords, I am authorised by VISCOUNT HAILSHAM, L.C., and by my noble and learned friend LORD WRIGHT, M.R., to state that they concur in the opinion which I am about to read.

The controversy in this action relates to fifteen consignments of goods imported by the appellants into this country from Germany in 1933-34. On the merits the sole question for determination is whether these consignments consisted of "flour" or of "wheat offals" within the meaning of the Wheat Act, 1932. But there is a preliminary point to be decided as to jurisdiction and also a point as to the applicability

of the time limit prescribed by the Public Authorities Protection Act, 1893.

The respondents, the Wheat Commission, who are the defendants in the suit, were incorporated by the Wheat Act, 1932, for the purpose of carrying the Act into effect. The object of that measure, as the long title sets out, is, *inter alia* :

to secure to growers of home-grown millable wheat a standard price and a market therefor; to make provision for imposing on millers and importers of flour obligations to make payments calculated by reference to a quota of such wheat, and as to the disposal of the moneys thereby received.

It is unnecessary to describe the elaborate machinery provided by the Act for effecting its object. For the present purpose it is enough to state that in order to meet the expenditure to be defrayed by the Wheat Commission under the Act every importer of flour is rendered liable to make to the Wheat Commission a payment (described as a "quota payment" and to be calculated in the prescribed manner) in respect of every hundredweight of imported flour entered by him or on his behalf, in accordance with the enactments relating to customs, for home consumption or home use (sect. 3 (1), which I have expanded by incorporating the definitions contained in sect. 20 (1)). The statute thus imposes what is in effect a customs duty on flour imported into this country for home consumption or home use. What, then, is "flour" within the meaning of the Act? Sect. 20 (1) provides the following definitions which are of critical importance in the interpretation and application of the Act :

"Flour" means the products produced by the milling of wheat, and includes all such products except substances separated in the milling as wheat offals. . . .

"Wheat offals" means the residual products which, in the process of milling wheat, are extracted therefrom as germ or for animal or poultry food.

Before proceeding to consider whether the fifteen consignments in question were or were not consignments of flour as so defined I must first give a brief history of them. It appears that in 1933 and 1934 the appellants, who are merchants and importers on a large scale of animal and poultry feeding stuffs, placed orders with various millers in Germany for goods described as "wheat middlings" or "German wheat middlings." It was common ground that in the trade and in the art of milling the term "middlings" designates certain grades of wheat offals—I am not professing to employ the expression here in its statutory sense—used for consumption by animals or poultry. On the arrival of the consignments in this country the Wheat Commission claimed in each case that they consisted of flour and demanded the appropriate quota payment from the appellants. The appellants maintained that the goods were wheat offals and not flour and contested the right of the Commission to exact any payment in respect of them. In order, however, to obtain entry of

the goods the appellants, under protest, paid to the Commission in the case of thirteen out of the fifteen consignments quota payments amounting in all to £2,554 2s. 3d. As regards the two remaining consignments, *ex* "Maartje" and *ex* "Deneb," in the case of the former the collector of customs by an oversight signed the entry without any quota payment being made, and in the case of the latter for some reason no quota payment has yet been made. From among the thirteen consignments, on which payment was made under protest, it is necessary to discriminate the three consignments *ex* "Resnova," *ex* "Noordstad" and *ex* "Mascotte." The quota payments on these three consignments amounting to £641 17s. 1d. were demanded and paid under protest in April and May, 1933, being more than six months before the issue on Mar. 5, 1934, of the writ of summons in the present suit. Hence the point as to the application of the Public Authorities Protection Act. Moreover, with regard to these three consignments arbitration proceedings, purporting to be under the Wheat Act, and the relative bye-law 20, were initiated between the appellants and the respondents to determine whether they were consignments of flour or consignments of wheat offals. By three awards dated July 3, 1933, the referee to whom the matter was submitted found that all three consignments were flour for the purposes of the Act. In their points of claim in the present proceedings the appellants claim repayment of the sum of £2,554 2s. 3d. as having been exacted from them in respect of thirteen of the consignments *colore officii* and without lawful authority, a declaration that bye-law 20 of the Wheat Bye-laws, 1932, is illegal and *ultra vires*, a declaration that the three awards above mentioned are null and void, and a declaration that none of the fifteen consignments in question was or is liable to quota payments.

As regards the three awards dated July 3, 1933, ROCHE, J. (as he then was), before whom the case came in the first instance, found that the referee had acted in the arbitrations in a manner so "wrongheaded . . . as to be contrary to natural justice," and the learned judge had no doubt that a court of equity would entirely refuse to allow such awards to receive effect. In the Court of Appeal counsel for the respondents did not attempt to defend the validity of the awards, and they may consequently be treated as null and void. But this does not absolve your Lordships from the task of determining whether bye-law 20 was *intra vires* of the Wheat Commission under the Act, for it was maintained at your Lordships' bar that the bye-law was valid and that, as the bye-law requires any dispute as to whether any substance is flour to be submitted to arbitration, no court of law has jurisdiction to determine whether the consignments in question were flour or not. The point of jurisdiction arises in this way. By sect. 5 (1) of the Act of 1932 the Wheat Commission is empowered "to make bye-laws for giving effect

to the provisions of this Act," and by sect. 5 (2) it is provided that without prejudice to the generality of this power, "bye-laws made under this section shall in particular provide . . . (m) for the final determination by arbitration of disputes arising as to such matters as may be specified in the bye-laws." Purporting to exercise the power thus conferred on them the Wheat Commission made a series of bye-laws of which No. 20, so far as material, reads as follows (I quote from the 3rd Edn. of the bye-laws, revised to Nov. 30, 1933):

20. Any dispute arising between the Wheat Commission and any other person as to whether any substance is flour . . . shall be referred to the arbitration of such member of the panel of referees appointed for the purpose by the Minister of Agriculture and Fisheries as may be agreed upon by the parties to the dispute or, in default of agreement, nominated by that Minister, and the decision of the referee as to the matter in dispute shall be final and conclusive.

The bye-law proceeds to provide that, in relation to any reference under it, *inter alia*, "(a) The Arbitration Act, 1889, shall not apply."

I should mention that under sect. 5 (1) all bye-laws require to be approved by an order of the Minister of Agriculture and Fisheries and the Secretaries of State concerned with agriculture in Scotland and Northern Ireland respectively, acting jointly, and that under sect. 18 (1) all bye-laws require to be laid before Parliament, and if either House within the prescribed time resolves that any bye-law be annulled it shall forthwith be void. It is understood that this procedure was duly observed and that no objection was taken to bye-law 20.

Both ROCHE, J., and all the learned judges in the Court of Appeal unanimously found the bye-law in question to be *ultra vires* of the Wheat Commission. They agree in affirming the general principle that the subject cannot be deprived of his right to resort to the courts of law of his country except by express enactment, and they find in the statute no words expressly ousting the jurisdiction of the courts or expressly authorising the Wheat Commission to frame bye-laws which shall have this effect. But ROCHE, J., and the Court of Appeal deal with the matter somewhat differently. To ROCHE, J., the cardinal vice of the bye-law is to be found in its exclusion of the application of the Arbitration Act, 1889, with the consequent deprivation of the rights which that Act confers and in particular the right of obtaining the judgment of the court on any point of law arising. The criticism of the Court of Appeal is more fundamental, for in their view a power to make bye-laws "for giving effect to the provisions" of the Act does not extend to the making of a bye-law referring to arbitration the question "whether any substance is flour." The argument is that as the Act applies only to substances which are flour, it is a condition precedent of the application of the Act to any substance that it shall be flour. Consequently a bye-law referring to arbitration the question whether a particular substance is

flour is a bye-law dealing with the question whether the provisions of the Act apply to the substance, and not a bye-law for giving effect to the provisions of the Act. A bye-law for giving effect to the provisions of the Act, it is said, assumes the application of the Act; the question whether the Act applies is a prior question of law and a bye-law professing to deal with this matter is not within the ambit of the delegated power of legislation conferred. The Wheat Commission were thus not empowered to specify in the bye-law as a matter, any dispute as to which was to be finally determined by arbitration, such a matter as the application of the Act to a particular substance.

My Lords, I do not agree with the learned judges of the Court of Appeal that the scope of the questions which by bye-law under the Act may competently be referred to arbitration does not include the question whether a particular consignment is or is not a consignment of flour. I reach my conclusion that bye-law 20 is *ultra vires* by much the same steps as ROCHE, J. I find first that there are no express words in the Act ousting the jurisdiction of the court, but only a power to make bye-laws for the final determination by arbitration of disputes arising as to such matters as may be specified in the bye-laws. I next find that the bye-law in question not only specifies as a matter to be determined by arbitration "any dispute . . . as to whether any substance is flour" but goes on to provide that to such arbitration the Arbitration Act, 1889, shall not apply. The Arbitration Act is a statute of general application and it confers a valuable and important right of resort to the courts of law. To exclude its operation from an arbitration is to deprive the parties to the arbitration of the rights which the Act confers. When a public general statute provides for the reference of disputes to arbitration, it is to be presumed that it intends them to be referred to arbitration in accordance with the general law as to arbitrations, with all the attendant rights which the general law confers. I do not think that when Parliament enacts by one statute that disputes under it are to be referred to arbitration it can be presumed to have empowered by implication the abrogation of another statute which it has enacted for the conduct of arbitrations. Rather the contrary. If this is intended, express words to that effect are in my opinion essential and there are here no such express words. I am accordingly of opinion that the Wheat Commission exceeded their powers when they made a bye-law that every dispute as to whether any substance is flour should be determined by an arbitration to which the Arbitration Act should not apply. I have only to add that the bye-law must, in my opinion, be condemned as a whole, and that it cannot be salved by the excision of the objectionable provision, which is not a severable but a vital part of the bye-law.

My Lords, the conclusion which I have reached that the bye-law is

not effectual to preclude consideration by your Lordships of the important question on the merits to which I now proceed to address myself may be received with less regret in view of the singularly unfortunate failure of the referee to deal justly between the parties in the three instances in which the question was referred to arbitration under the bye-law.

What, then, I again ask myself, is statutory flour which is subject to the quota payment, and what are statutory wheat offals, which are not? In the words of the statute, stated compendiously, flour means and includes all the products produced by the milling of wheat except substances separated in the milling as wheat offals, i.e., as residual products which in the process of milling wheat are extracted therefrom as germ or for animal or poultry food. What strikes one at once about this definition is that it is not expressed in any quantitative, analytical or scientific terms. No such criterion of discrimination is prescribed. It is a description rather than a definition. It assumes that the milling of wheat is a known industrial process, but it does not define that process. It may, however, be taken to refer to the process of milling wheat for the purpose of producing flour, as in the definition which the Act gives of the term "miller" (although that definition is limited to millers in the United Kingdom). The process produces two things: a primary product, namely, flour and residual products, namely, wheat offals. In the process the wheat offals are "separated" (presumably from the flour) as wheat offals and are "extracted" from the wheat as germ or for animal or poultry food. So much but no more the Act tells us. If there was a precise and definitely ascertained process of milling wheat, the definition might attain some measure of certainty for there might be in the industry an accepted standard of quantitative separation or extraction of residual products which it might be legitimate to imply in the definition. But the process of milling wheat for the production of flour is not a process characterised by any exactitude. Wheat, as the parties are agreed, consists of 83 per cent. of endosperm or kernel, 15 per cent. of husk and 2 per cent. of germ. The last may be neglected. If in the process of milling the endosperm could be entirely separated from the enveloping husk and ground down to powder, the product would be pure flour. But the process of milling is not in practice, and could not practically be, carried so far as to separate or extract all the husk and leave nothing but pure flour. So all commercial flour, even the finest, contains some husk. Similarly the residual products extracted from the wheat as offals in the process of milling are not pure husk but contain a varying proportion of flour. There is no fixed standard determining the amount of husk in flour or the amount of flour in offals. It is obvious that a miller who is engaged in milling wheat for the purpose of producing flour may separate or extract from the wheat more or

less residue according to the efficiency of his machinery, the methods which he employs and the requirements of his market. He produces, as I have said, two marketable commodities, flour, his primary product, and wheat offals, his residual product. The quality and composition of those two products may vary within a wide range as between one mill and another and between one country and another and may be affected by the qualitative demands of the market from time to time. The statute nowhere says that the process of milling must for the purposes of the Act conform to any particular standard of extraction. It does not say how much flour or how much offal the miller must obtain from milling a given quantity of wheat.

My Lords, at an early stage of the hearing your Lordships expressed the view, the soundness of which is in my opinion beyond question, that the scientific evidence adduced at the trial as to the composition of wheat, flour and offals, however interesting, was entirely beside the question. I find no warrant whatsoever in the statute for importing into it any such tests, which are not in use in the trade and which have been devised, partly for the purposes of this case, by the ingenuity of chemists in their laboratories. This, be it remembered, is a statute laying an impost upon the subject. If the legislature had been minded to make the liability to tax depend upon any such analytical tests, it would have prescribed them, as it has done in other instances. In common, therefore, with the rest of your Lordships I discard the scientific evidence as affording no assistance in the solution of the problem.

Now the Court of Appeal, while they were evidently more influenced by the scientific evidence than your Lordships have been, nevertheless did not adopt the chemical tests for flour which were put forward. In their search for some definite objective criterion the learned judges of the Court of Appeal were attracted by and have adopted a different test, on lines propounded by the Wheat Commission, for which, with all respect, I find just as little justification in the statute as I have found for the analytical tests. They find the clue in the expression "milling of wheat," and with the help of their interpretation of that expression they arrive at what I may call a process criterion. After premising that the primary product obtained from milling wheat within the meaning of the Act is indubitably flour, ROMER, L.J., proceeds, at pp. 361, 362:

Presumably every person whose trade it is to mill wheat for the purpose of producing flour will mill it so as to obtain as much flour as possible. It seems to follow, therefore, that "wheat offals" must be products that remain after wheat has been milled with the primary intention of extracting the greatest possible quantity of flour. . . . Milling wheat means obtaining from the wheat as large a quantity of flour as is possible.

LORD HANWORTH, M.R., at p. 355, also finds, as a result of his reading of the Act, that :

it is postulated that the primary purpose of milling wheat is to produce as much flour as possible for home consumption or home use.

There was evidence that an ordinarily efficient mill could produce from 70 to 72 per cent. of flour from a given quantity of wheat. This is accepted by the Court of Appeal as the "normal" production of flour from wheat and they hold accordingly that it is only after this percentage of extraction has been effected that the residual product can legally be held to be offals. My lords, I find myself unable to adopt any such test and that for the simple reason that I find no warrant for it in the statute. It is certainly legitimate to interpret technical or trade terms in a statute in accordance with the usage of the art or trade, and if there had been evidence to the effect that at the time when the Wheat Act was passed no substances were commercially recognised as wheat offals unless they were the residual products left after 70 to 72 per cent. of flour had been extracted from the wheat I should have felt the cogency of the view adopted by the Court of Appeal. Your Lordships will recall the criterion which this House adopted and has repeatedly applied for the determination of the meaning of the word "minerals" as used (without any statutory definition) in the Clauses Acts. The meaning of the word, it was held, must be that attributed to it in "the vernacular of the mining world and commercial world and landowners"; in other words, in the vernacular of those who were practically concerned with minerals (*Glasgow Corporation v. Farie* (1), per LORD HALSBURY, L.C., at p. 669, adopting the words of JAMES, L.J., in *Hext v. Gill* (2), at p. 719). But in the present case there was no evidence that in the vernacular of those concerned in manufacturing, dealing in or using wheat offals there was any consensus of opinion to the effect that only those substances are wheat offals which result from milling operations in which 70 to 72 per cent. of flour is extracted from the wheat milled. This so-called normal or average milling practice, as ROCHE, J., points out, was :

far from universal either before the Act or now. . . . As in the present, so in the past, it is clear from the literature that offals such as the Commission would now describe as abnormal and subject to quota payment have been genuinely produced as residual products and sold and bought as offals for animal and poultry feeding.

This the learned judge vouches by reference to articles on wheat offals contained in the official journal of the Ministry of Agriculture which were produced in evidence. It is certainly remarkable to find that public department recommending that :

attention should be directed to the excellent feeding value possessed by the fine

middlings. From the feeder's point of view, it is to be regretted that so little of this class of offals is made in this country at the present time ;

while another public body in the shape of the Wheat Commission would apparently deny the name of offals to such middlings. The learned judge further finds that :

not all British mills to-day produce the grade of offals which the defendant Commission desire to treat as normal and to adopt as the standard measure for the purposes of the Act, and some mills produce or recently have produced richer offals, that is to say, richer in endosperm content and feeding value and containing more flour, that is to say, finer offals. These home produced offals are, for uniformity of practice and consistency, in the Commission's view, subject to quota.

My Lords, I think I have said enough to show that the test which commended itself to the Court of Appeal is not one which can be justified. ROMER, L.J., suggests that support may be found for it in sect. 20 (2) (b), which provides that :

if in any parcel containing substances produced by the milling of wheat the weight of those substances, other than wheat offals, does not exceed $7\frac{1}{2}$ per cent. of the weight of the parcel, the parcel shall be deemed not to contain flour.

As all the products of the milling of wheat other than wheat offals are by definition flour I can only take this obscurely worded paragraph to mean that if a parcel of flour and wheat offals does not contain more than $7\frac{1}{2}$ per cent. of flour the parcel is to be deemed not to contain flour. I confess I do not see how this helps. Moreover, ROMER, L.J., at p. 362, records the astonishing fact that the $7\frac{1}{2}$ per cent has :

always been treated by the Wheat Commissioners as being merely an approximate guide, and in practice they do not claim as being flour any parcel that indicates an addition that is under 20 per cent.

What right the Wheat Commission have to exercise "this tolerance," as it is described, I am at a loss to understand. If it shows anything, it shows how unworkable are the provisions of the Act as the Commission interpret them. But, while the test on which the Court of Appeal relied must, in my opinion, be discarded, the fate of the fifteen consignments in question has still to be decided. I suggest that the words of the Act itself provide the means of doing so. The questions to be asked are : Were the substances of which the consignments were composed produced by the milling of wheat for the purpose of producing flour ? Were they separated in the milling as wheat offals ? Were they residual products extracted from wheat for animal or poultry food in the process of milling the wheat ? To these questions the learned trial judge returns a compendious answer in the affirmative when he finds on the facts that :

all these parcels were separated in the milling of wheat for flour as a primary product, that is to say, flour was the primary product desired to be produced, and being produced in the milling, and that these parcels were separated in milling as wheat offals or residual products.

The consignments were just as they came from the mills without any mixture, they were described as wheat middlings, which is a trade designation of a class of wheat offals, they were intended for animal or poultry food and it was for that purpose that the appellants purchased and imported them. The *bona fides* of all concerned is in no way challenged. The result, in my opinion, is that the appellants have established that all the consignments were within the meaning of the Act consignments of wheat offals and not of flour, and were consequently exempt from any quota payment. The sequel would in the ordinary case be judgment for the return of the quota payments wrongfully exacted by the respondents in the case of thirteen of the consignments and a declaration that the two other consignments are not liable to any quota payment. But, as I indicated at the outset, the respondents plead that, as regards three of the consignments, they are entitled to keep the money which they have illegally obtained from the appellants, because the appellants did not sue them within six months for the return of the money. The plea is based on the provisions of the Public Authorities Protection Act, 1893. The courts below have unanimously held that the respondents are a public authority within the meaning of the Act, and I agree with them. The only other question is whether the act of the Wheat Commission in exacting the payments was an act done in the intended execution of the Wheat Act. I can see no sufficient ground for holding otherwise. The appellants themselves in their points of claim say that the payments were exacted by the respondents *colore officii*. That being so, the statute protects the respondents against any suit for recovery of these exactions not brought within six months of the date of the exactions. This enables the respondents to retain £641 17s. 1d. of the sum of £2,554 2s. 3d. sued for, leaving a balance of £1,912 5s. 2d. for which judgment will go out, with a declaration of immunity as regards the consignments *ex* "Maartje" and *ex* "Deneb," in terms of the order by ROCHE, J., of May 9, 1934, which I move your Lordships to restore with costs in this House and in the Court of Appeal.

Appeal allowed with costs.

Solicitors : Thomas Cooper & Co. (for the appellants) ; Parker, Garrett & Co. (for the respondents).

[Reported by MICHAEL MARCUS, ESQ., Barrister-at-Law.]

B—— v. B—— AND G——.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Langton, J.), July 22, 1936.]

Divorce—Pleading—Husband's petition asking for discretion—Wife's answer containing cross-prayer for dissolution—Sole allegation against husband based on fact of application for discretion—Insufficiency of pleading—Matrimonial Causes Rules, 1924, r. 30 (c).

A husband's petition for dissolution of marriage, on the ground of the wife's adultery, included a prayer for discretion in the usual form. The wife, by her answer, denied adultery and alleged adultery against the husband, with a cross-prayer for dissolution. The wife could give no particulars of her allegation, but stated that in making it she relied solely upon the fact of the husband's application for the discretion of the court:—

HELD: the wife's pleading was insufficient and the allegation of adultery against the husband should be struck out.

EDITORIAL NOTE. The point here is purely one of pleading and proceeds from the cardinal rule that a petition, whether it be an original petition or a cross-petition, must give proper particulars of the adultery alleged. In the present case, it is admitted that the cross-petitioner has no knowledge of the adultery alleged other than that derived from the statement of the petitioner that he will ask for the discretion of the court. As the form of this is purposely framed to avoid a confession, it does not afford sufficient particulars.

AS TO PARTICULARS OF ADULTERY, see HALSBURY, Hailsham Edn., Vol. 10, p. 710, para. 1069, and FOR CASES see DIGEST, Vol. 27, pp. 399, 400, Nos. 3960-3975.]

Case referred to:

(1) *Bevis v. Bevis*, [1935] P. 86; Digest Supp.

SUMMONS ADJOURNED into court.

This was an appeal from the order of the registrar, striking out an allegation of adultery against the husband contained in the respondent wife's answer, on the ground that her pleading was insufficient. The husband's petition for dissolution on the ground of the wife's adultery with the co-respondent comprised a prayer for discretion in the usual form. The respondent and co-respondent filed answers denying adultery and there was an allegation of adultery against the husband, with a cross-prayer for dissolution by the wife. The wife could give no particulars of that allegation, but stated that in making it she relied solely upon the fact of the husband's application that the court should exercise its discretion in his favour.

C. L. Beddington, for the wife.

P. B. Morle, for the husband.

LANGTON, J.: In this case the matter has been most tenaciously argued on both sides, and I am bound to admit that in the end I am by no means free from doubt.

B., on Mar. 18, 1936, filed a petition asking for the dissolution of his marriage. In his prayer he states that he will ask for the exercise of

the court's discretion. This, I am informed—and from my own experience I believe it to be so—is the proper and usual method of asking for the discretion of the court. Mrs. B., in her answer, says, first, she is not guilty of adultery as alleged in the petition, and then pleads that the petitioner has committed adultery. Upon that allegation that the petitioner has committed adultery, she asks that the petitioner's prayer should be rejected and that the marriage may be dissolved. At the same time she delivered particulars of para. 2, in these terms :

The respondent relies on the fact that the petitioner has asked that your Lordship will exercise your discretion in his favour. Beyond this she is unable to give any particulars of the petitioner's adultery.

The matter was brought before Mr. Registrar Wilkinson upon a summons asking that para. 2 of that answer should be struck out, and the registrar, adopting the view that the pleadings were insufficient, has struck out para. 2 of the respondent's answer. The matter now comes before me by way of an appeal on summons asking to set aside the registrar's order. Mr. Beddington, on behalf of the wife, says that he is entitled to put forward that bare allegation that the petitioner has committed adultery, supported by only the particulars that I have read, because the petitioner's statement that he is asking for the discretion of the court is a full and complete notice that he has committed adultery. Secondly, he says, if it is not a full and complete notice, it is a fact on which the respondent is entitled to allege that he has committed adultery, and it is no hardship upon the petitioner that he should have the matter stated in this bald manner without particulars, because she has given notice that she will and can only rely upon evidence which he, the petitioner, may give.

It is important, I think, to bear in mind that this is a question of pleading, and pleading only. It does not concern the rights of the parties, nor does it really concern the question which was canvassed in the case of *Bevis v. Bevis* (1), namely, the question of admissibility of evidence after publication to the respondent of the petitioner's discretion statement. I am bound to admit that I have great difficulty in this case on one statement of the law that fell from MAUGHAM, L.J., as he then was, in that case. Until the case of *Bevis v. Bevis* (1), I held in my own mind a perfectly clear view of what the relation should be between this court and a petitioner who has filed a discretion statement. I put this perfectly respectfully, as it is meant to be perfectly respectful, when I say that the decision of the Court of Appeal in that case revolutionised the idea that I originally held. I am not quite certain that, out of the welter of revolution, anything very clear has now emerged, but I am quite certain that it is my fault, and not their fault, if my mind is at present in a state of some obscurity. In that case,

which, as I say, did not deal with pleading, but dealt with admissibility of evidence, MAUGHAM, L.J., said, at p 97 :

It may be observed that the petitioner, the husband, in the previous proceedings, according to the usual practice, stated in his petition that he would ask for the exercise of the discretion of the court in his favour, which was notice that he had been guilty of adultery and was notice to the wife that, complying with the direction, he had filed or lodged with the application for the registrar's certificate a statement of the matters in respect whereof the exercise of the discretion was prayed.

That statement gives me great pause in dealing with the matter at issue in the present case, because, as it stands, it certainly seems to be a very helpful pronouncement towards Mr. Beddington's statement that a prayer for discretion is notice that the petitioner has committed adultery. Speaking for myself, and without that guidance of MAUGHAM, L.J., I should be inclined to doubt whether it was notice of anything more than the words actually stated, namely, that the discretion of the court would be requested in this particular case, but I cannot shut my eyes to the fact that MAUGHAM, L.J., says that it is something more ; it is notice that he has been guilty of adultery. I must take the law as I find it, but, on the other hand, it would not be right, of course, to press a *dictum* of this kind too far, and, as Mr. Morle has pointed out, the court was not in that case addressing its mind to any question of pleading at all. It was dealing with admissibility of evidence in a particular case, which was a case heard and tried under rules which are not the rules in force to-day. Mr. Morle points out that this statement, if it were to be taken as applicable to that particular case, might have one meaning, and that it would be unfair to give it another when applying it outside the facts of a particular case. Looking at the whole of the matter and reminding myself of the present new rules, which are conveniently set out in [1935] P. at p. 99, I think that is the proper view to take. I would be loth to subscribe to the suggestion that what MAUGHAM, L.J., then said was *obiter*. That would almost seem to suggest that he was saying something which was not germane to the point. I do not think that it was *obiter* to that particular decision. I think that the real distinction is the other distinction, as Mr. Morle pointed out, and that is, that he was not dealing with matters under the present rules. Apart from that statement of MAUGHAM, L.J., I should have, I think, very little difficulty in this case. The old rules of pleading are well settled and never better stated, I think, than in Dr. Blake Odgers' well known book on PLEADING AND PRACTICE. Taking a statement from the 11th Edn., at pp. 130 and 131, dealing with charges of misconduct, the rule is there stated with particularity and the case where a pleading contains an imputation upon the character of your opponent is specially noted. He goes on to say, at p. 131 :

It is no excuse for the omission of such details, that the opponent must already be perfectly well aware of the facts.

Mr. Morle reinforced that by applying the test which I think may very fairly be applied to this class of matter : Can the allegation stand on its own feet independently of an allegation to be found in the petition, or, as it might be in the King's Bench Division and Chancery Division, the statement of claim ? I think that is quite a fair test to apply. Applying that test, it is clear that this allegation cannot stand for a moment without the support that it obtains from the original petition. It is argued, and I think again fairly, that this is in the nature of a cross-petition and counterclaim, and it is therefore right to test it, not merely as an answer in defence, but really as a matter of fact. If one were to assume that the petition was by leave discontinued to-morrow, it is clear that this allegation and this attack would fall immediately to the ground. Therefore, treating the matter as a mere question of pleading, upon the well known rules of pleading, it seems to me that this appeal must fail, and that the registrar was right in saying that it cannot stand, for want of particularity.

A further point was made by Mr. Morle, which seemed to me to have weight and substance. I only feel a doubt concerning it, because it introduces again the relation between the court and the petitioner asking discretion, as to which I had been left uncertain by the decision of the Court of Appeal in *Bevis v. Bevis* (1). He says that if this allegation were allowed to stand, the petitioner would be placed in the greatest possible difficulty in pleading to it : he must either admit it and then make a confession, which at present does not stand and which it certainly seems the rules are clearly designed to avoid, or he must deny and stultify his own prayer for discretion. It does appear that if the allegation were allowed to stand, he would be forced to do something which the rules, as enshrined in the practice, clearly seek to avoid, and his action must give the respondent an advantage by reason of his own frankness to the court. I feel, as I say, some diffidence in approving this argument as a whole, because I am not sure that that kind of argument would find any favour in the Court of Appeal. I am not sure that that is not just the kind of argument by which I was misled, according to the majority, at least, in the Court of Appeal in the case of *Bevis v. Bevis* (1), and I want it to be understood that I am basing my judgment upon the rules of pleading in dealing with this matter of pleading, and not upon what may be a wrong or obscure notion as regards the relation between this court and the parties who come to seek the assistance of this court.

The appeal therefore fails.

Solicitors : *Braund & Hill* (for the wife) ; *Croft & Mortimer* (for the husband).

GREIN *v.* IMPERIAL AIRWAYS, LTD.

[COURT OF APPEAL (Greer and Greene, L.JJ., and Talbot, J.), **April 30, May 1, 5, 11, 12, 13, 14, 15, 18, July 13.**]

Carriers—Carriage by air—Carriage of passengers—Liability for accident—International carriage—Fatal accident—Claim by dependants—Special contract—Limitation of liability—Exclusion of liability in tort—Liability under implied contract—“Wrongful act, neglect or default”—Carriage by Air Act, 1932 (c. 36)—Fatal Accidents Act, 1846 (c. 93), s. 1.

The defendants issued a return ticket undertaking to carry a passenger from London to Antwerp and back by air. The aeroplane met with an accident upon the return journey due to negligence for which the defendants were held to be liable and the passenger was killed. The ticket was issued subject to many special conditions, including the following: (a) Except in so far as liability is expressly provided for in these conditions, the passenger renounces for himself and his representatives all claims for compensation for damage in connection with the carriage, whatever may be the legal grounds upon which any claim concerning any such liability may be based; (b) The carriers are not liable for the death of a passenger if they prove that they and their agents have taken all necessary measures to avoid the damage, or that it was impossible for them to take such measures. The Carriage by Air Act, 1932, limits the liability of air carriers to 125,000 francs in cases of international carriage as defined in sched. I, art. 1 (2) of that Act; and for the purposes of this case, whether or not the journey here in question was international carriage depended upon whether it was a journey from London to London with a stopping place at Antwerp or a journey from London to Antwerp as a destination with an additional undertaking subject to certain conditions, to carry the passenger back from Antwerp to London:—

HELD: (i) (GREER, L.J. dissenting) the contract was one of international carriage.

(ii) even where the contract prohibits an action in tort, a breach of contract to exercise reasonable care is a “wrongful act, neglect or default” within the Fatal Accidents Act, 1846, s. 1.

(iii) the wording of the contract was sufficient to exclude a liability in tort.

(iv) per GREER, L.J.: there was an implied contract to take reasonable care.

(v) per GREENE, L.J.: the contract expressly excluded any contract to take care and substituted what may be described as a modified system of insurance—an obligation on the carriers to pay compensation unless they prove they have taken “all reasonable measures to avoid damage or that it was impossible for them to take such measures.”

(vi) assuming there was an implied contract to take care, the principle of *Nunan v. Southern Ry. Co.* (6) applied, and the agreement of the deceased to limit his damages did not bind the dependants.

[EDITORIAL NOTE.] The main point discussed here is whether or not the carriage is international carriage. This matter was the subject of disagreement, and a further point of disagreement was as to whether the special conditions to which the ticket was subject amounted to an implied contract to take reasonable care, or whether it expressly excluded any such agreement and created a “modified” form of insurance. Apart from these matters of disagreement, however, there are important points upon which the court was unanimous. It is decided that the words “wrongful act, neglect or default” in the Fatal Accidents Act, 1846, s. 1,

include a breach of contract as well as a tort, a matter that has not arisen previously because the liability in tort has not been excluded. It was also agreed that the principle of *Nunan v. Southern Ry. Co.* (6) applied where there was an implied contract to take care and any limitation of liability agreed to by the deceased did not bind the defendants.

It should be noted that the ticket stated that its conditions were based on the convention, and in *Westminster Bank, Ltd., v. Imperial Airways, Ltd.*, [1936] 2 All E. R. 890, it was held that this statement was insufficient to satisfy the terms of the Carriage by Air Act, 1932, sched. I, art. 8 (q). The ticket is subject to a precisely similar provision in art. 3 (1) (e). The point was not pleaded or taken in the present case, but it seems that the decision herein must be read subject to the effect of that in *Westminster Bank* case (*supra*).

FOR THE CARRIAGE BY AIR ACT, 1932, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 25, p. 865; and AS TO AGREEMENTS BY PASSENGERS TO TRAVEL AT OWN RISK, see HALSBURY, Vol. 4, pp. 73, 74, para. 110; and FOR CASES, see DIGEST, Vol. 8, p. 102, Nos. 680-682; and Vol. 36, pp. 134, 135, Nos. 894-896, and p. 136, No. 903.]

Cases referred to :

- (1) *Montreal City v. Watt & Scott, Ltd.*, [1922] 2 A.C. 555.
- (2) *Haigh v. Royal Mail Steam Packet Co., Ltd.* (1883), 52 L.J. Q.B. 640; 41 Digest 667, 4984.
- (3) *The Stella*, [1900] P. 161; 41 Digest 667, 4935.
- (4) *Baker v. Bolton* (1808), 1 Camp. 493; 36 Digest 127, 843.
- (5) *Admiralty Comrs. v. S.S. Amerika*, [1917] A.C. 38; 36 Digest 128, 846.
- (6) *Nunan v. Southern Ry. Co.*, [1924] 1 K.B. 223; 36 Digest 135, 896.
- (7) *Seward v. The Vera Cruz* (1884), 10 App. Cas. 59; 1 Digest 34, 265.
- (8) *Flint v. Lovell*, [1935] 1 K.B. 354; Digest Supp.
- (9) *Peninsular & Oriental Navigation Co. v. Shand* (1865), 3 Moo. P.C.C. N.S. 272; 8 Digest 127, 854.
- (10) *Cohen v. South Eastern Ry. Co.* (1877), 2 Ex. D. 253; 8 Digest 56, 368.
- (11) *Wing v. London General Omnibus Co.*, [1909] 2 K.B. 652; 36 Digest 89, 594.
- (12) *Quebec Railway Light, Heat & Power Co. v. Vandry*, [1920] A.C. 662; 42 Digest 780, 2100.
- (13) *Readhead v. Midland Ry. Co.* (1869), L.R. 4 Q.B. 379; 8 Digest 71, 480.
- (14) *Taylor v. Manchester, Sheffield & Lincolnshire Ry. Co.*, [1895] 1 Q.B. 134; 42 Digest 970, 21.
- (15) *Meux v. Great Eastern Ry. Co.*, [1895] 2 Q.B. 387; 42 Digest 970, 20.
- (16) *Rose v. Ford*, [1936] 1 K.B. 90; Digest Supp.
- (17) *Owen v. Sykes*, [1936] 1 K.B. 192; Digest Supp.
- (18) *Marshall v. York, Newcastle & Berwick Ry. Co.* (1851), 11 C.B. 655; 8 Digest 121, 811.
- (19) *Austin v. Great Western Ry. Co.* (1867), L.R. 2 Q.B. 442; 8 Digest 95, 638.
- (20) *Foulkes v. Metropolitan District Ry. Co.* (1880), 5 C.P.D. 157; 8 Digest 106, 704.
- (21) *Kelly v. Metropolitan Ry. Co.*, [1895] 1 Q.B. 944; 42 Digest 970, 22.
- (22) *Turner v. Stallibrass*, [1898] 1 Q.B. 56; 42 Digest 968, 8.
- (23) *Re Young & Harston's Contract* (1885), 31 Ch. D. 168; 40 Digest 121, 957.

APPEAL by the defendants, Imperial Airways, Ltd., from a judgment of LEWIS, J., dated Oct. 23, 1935. The action arose out of an accident to the aeroplane "Apollo," owned by the defendant company, and which

collided with the wireless mast at Ruysselede, Belgium, and crashed on Dec. 30, 1933. All the occupants of the aeroplane lost their lives.

The action was brought by the plaintiff, Frau Elsa Charlotte Grein, of Wiesbaden, Germany, on behalf of herself and her daughter, Fräulein Elli Grein, to recover damages, under the Fatal Accidents Act, in respect of the death of her husband, Louis John Hermann Grein, who was a passenger in the aeroplane. LEWIS, J., found that the defendant company, by their servants, were negligent in the management of the aeroplane and that such negligence was the cause of the accident, and he awarded £3,500 damages to Frau Grein and £500 to her daughter. His Lordship also held that the liability of the defendant company was not limited by the Carriage by Air Act, 1932, by reason of the carriage being international carriage within the definition contained in sched. I, art. 1 (2) of that Act, and that the plaintiff was entitled to recover under the Fatal Accidents Act. Further, the right of the widow was not affected by anything contained in the contract of carriage into which the deceased had entered with the defendant company.

The appeal was brought by the company on the ground that there was not sufficient evidence to support a finding of negligence, and it was also contended that the deceased was carried under a contract of international carriage, within the meaning of the Carriage by Air Act, 1932, and that therefore the liability of the defendant company was limited accordingly. Alternatively, it was contended that the liability of the defendant company was limited by the terms of the contract of carriage.

A. T. Miller, K.C., and *H. G. Robertson* for the appellants.

Harold Murphy, K.C., and *Clive Burt* for the respondent.

Miller, K.C.: A claim cannot be sustained under Lord Campbell's Act. When one looks at the Act, one sees the mischief it was designed to avoid. The old rule of law appeared to work injustice and dependants were left without remedy. If the deceased had disintitiled himself to anything, it is not illogical that the dependants should have no claim. A new cause of action only arises in certain events as where negligence gives a right to sue and at the moment of death the right was in existence. If at the moment of death the right had been extinguished, no new cause of action arises. The statute does not give a cause of action, because the deceased had by his conduct given up all his rights of action at common law for a new right which was substituted under the contract. The Imperial Airways, Ltd., held themselves out to carry the deceased only on the condition that they should not be liable in respect of anything except under their contract with him. The contractual liability of the carriers only arises under the conditions of the contract, and it is a liability to pay if the passenger is hurt, or injured, or killed, and that is the primary ground of the obligation. But it is a liability avoided if the carriers have taken

all necessary steps to avoid the damage or if it is impossible to take such steps. The obligation does not rest upon negligence at all, but upon the contractual liability, putting the onus for any defence upon the carriers. An action under Lord Campbell's Act is an action in tort, and the statute only applies where the claim is based upon negligence.

The learned judge thought that the pilot caused the accident by his negligence. But the findings are all in favour of Imperial Airways, Ltd., except as to the conduct of the pilot in the last few moments of the flight. Therefore it was necessary to discharge the onus under the clause, and it related to something which was done in the circumstances which existed between 12.46 and 12.54 on the day of the accident. In that eight minutes a capable pilot was navigating a properly manned aeroplane in circumstances of extreme difficulty not created by any improper action on his part. There was failure of the wind, failure to get a bearing by wireless, and the pilot may have got into his instrument some of the ice which was forming and may have been hampered. His course seems to have been consistent with his having control of the aeroplane and he was trying to pick up the railway in the belief that he was north of it. The alternative view is that he made an attempt to rise above the obstacle in front of him and got into the ice-forming layer and got his machine out of control. The learned judge at the trial said there was no negligence in starting and no negligence in proceeding, but negligence when the pilot continued when he knew he could not get a bearing for more than ten minutes. But not enough is known of the circumstances of the case to say that the pilot was negligent. It is impossible to say what was in his mind, and when faced with the alternative of different courses, all of which must have involved risk, and by circumstances over which he had no control, the pilot should not be blamed for negligence unless it was demonstrated with reasonable certainty that he was negligent. In the circumstances, he selected what seemed the best course to him, and in the absence of any other material it is impossible to say that the pilot was negligent. In the agony of the moment, an experienced man in charge of a sound machine was brought by a combination of adverse circumstances beyond his control into a crisis in which a decision was urgently required. He took a course which did not avoid the danger, but any other course might have produced an accident. It was impossible for him to control the situation or be certain that any steps would avoid danger. There was no negligence. The circumstances which are known, and proved, are consistent with explanations which do not involve negligence. The materials are incomplete. The ice-forming conditions, the conditions of fog, the failure of the wind and the failure of the wireless have all been proved. The accident was to be attributed to dangers and difficulties and not to negligence. An aeroplane in flight must keep going.

It is not like a ship at sea. The plaintiffs adopted the burden of proof and they cannot say that the rule *res ipsa loquitur* applies. [He referred to : *Nunan v. Southern Ry. Co.* (6); *Wing v. London General Omnibus Co.* (11); *Quebec Railway Light, Heat & Power Co. v. Vandry* (12); *City of Montreal v. Watt & Scott, Ltd.* (1); *Seward v. The Vera Cruz* (7).]

H. G. Robertson, following on the same side: There is no right of action left under this contract for tort. The obligation to carry safely is the obligation of a common carrier. It has been decided that the obligations of a railway company are not the obligations of a common carrier, but merely to take care. The action against a railway company has been decided by the Court of Appeal to be an action of tort, because the plaintiff has to prove negligence against the railway company, no matter whether he has a contract or not. As regards the present case, the convention of Warsaw was an attempt by various countries to arrive at uniform terms of carriage for the purpose of international carriage. The general conditions of carriage adopted by Imperial Airways were an attempt by an international association of carriers by air to apply the same conditions, and whether one looks at the conditions in the convention or in the conditions laid down by this international association, one finds an attempt to define exactly what were to be the conditions of the traffic, subject to anything which might be incorporated in any particular contract. The persons who drafted these conditions were attempting to define what should be the rights and duties existing between the two parties. This point only arises if the argument that this is international carriage is not accepted.

One of the most important things with regard to carriers by air was to know their liability. Art. 19, para. 1, states the extent of the liability, as it is defined in art. 18. It is not necessary to decide whether the carrier is guilty of negligence or not. The carrier is liable in the case of accident unless he can bring himself within the clause which says he shall not be liable if he has taken all necessary measures to prevent the damage. There is a limit of 125,000 francs to the liability unless a larger sum has been agreed upon. If it is international carriage, the carrier is bound by the statute as part of the law. If the carriage is not international, the parties may make any contract they like. There is no variation between the conditions of the ticket and the provisions of the convention. There can be no contracting out of the terms of the convention. There was no outstanding claim left in Mr. Grein at the time of his death except a contractual right to maintain an action under the contract, and that was not a cause of action within sect. 1 of Lord Campbell's Act upon which his personal representative could sue. A breach of contract is not within the words "wrongful act, neglect or default" in that section. [He referred to : *Readhead v. Midland Ry. Co.* (13); *Taylor v. Manchester, Sheffield & Lincolnshire Ry. Co.* (14); *Meux v. Great Eastern*

Ry. Co. (15) ; *Flint v. Lovell* (8) ; *Rose v. Ford* (16) ; *Owen v. Sykes* (17).]

Murphy, K.C. : The wireless station is the only obstacle the pilot would have to face, and it is perfectly familiar to every pilot. It consists of eight pylons each 932 feet high and covers a rectangular area of a mile by a quarter of a mile. Reference had been made to church steeples and factory chimneys as if they were in some way *in pari materia* with this wireless station. The pylons were nearly as high as the Eiffel Tower. Within ten miles of the wireless station the pilot was flying at a height less than the pylons. There was no evidence that there was any ice-forming layer between Haren and Ruysselede. The sole evidence of an ice-forming layer was the formation of some ice on the machine between Cologne and Brussels. The learned judge found negligence and based it on the fact that the pilot continued to fly on at a height lower than the height of the pylons although he failed to get his message after 12.46. Bearings only help regarding the direction and not about the height. The court has seen three parts of the actual ticket of Mr. Grein. The rest have been re-constructed. The court had also the erroneously re-constructed ticket and we now know that Brussels to London was wrong. I do not accept the place of issue or the date of issue—Dec. 16, 1933—as correct. The actual place of issue and the date of issue of the return half would not necessarily be filled in in London. It is said that this is a contract of international carriage. It was only in Oct., 1935, that it dawned upon these people that they had made a contract of international carriage. There were two contracts of carriage. But if there were only one contract, it is sufficient for my purpose to say that there was one contract for two carriages, namely, one from London to Antwerp at one price, and one from Antwerp to London at another price. The argument that the contract was international carriage was based upon the Carriage by Air Act, 1932, sched. I, and the fact that London was within the territory of a High Contracting Party. If it was a return ticket from Antwerp, there could be no question at all that Antwerp was not within the territory of a High Contracting Party. The governing factor is the contract made by the parties, defining places of departure and destination. In this case, the place of departure and the place of destination were in England. The ticket was not one ticket but two tickets, and it was not one carriage but two carriages, one from London to Antwerp and one from Antwerp to London, both carriages being governed by similar conditions but being carried out at a different contractual price. There is nothing upon the ticket to show that it was subject to the rules of the convention. This was an agreement made in England, by an English company, and it is governed by English law.

On the established facts in this case, if Mr. Grein had been injured he would have had a perfectly good claim against Imperial Airways, Ltd., and it comes within the authority of *Nunan's* case (6). [Counsel also

referred to : *Marshall v. York, Newcastle & Berwick Ry. Co.* (18) ; *Austin v. Great Western Ry. Co.* (19) ; *Foulkes v. Metropolitan District Ry. Co.* (20) ; *Kelly v. Metropolitan Ry. Co.* (21) ; *Turner v. Stallibrass* (22) ; *Re Young & Harston's Contract* (23).]

Miller, K.C., in reply : This contract is reasonably plain. While one may approach a contract of this type with a not unnatural desire to read it so that the dependants may have advantages, following the death, the point is : What does the contract say ? Cases have been quoted to show that, apart from contract, it might be possible to claim in tort for failure to carry with reasonable safety, or that, in the absence of a contract, there was an implied term that the passenger should be carried safely. Whether it be under contract or under tort, a person would have common law rights, but the point in this case is that the rights have been given up by this contract. Mr. Grein had, by the contract, given up for himself all claims to compensation, except in so far as liability is expressly provided for in the conditions. *Nunan's* case (6) has no application. The Fatal Accidents Act has never been applied in such a case as this and it does not apply. There was no breach of the contract, and it cannot be said that the application arises. All implications are excluded by para. 5 of the contract and Mr. Grein was content to make his contract, trusting to the obligation of the company to pay under the contract. That does not come within the terms of the Fatal Accidents Act, the object of which was to remedy a defect existing in the law of tort.

It is a matter of importance whether this is a contract of international carriage or not. The carriage was divided into stages for the convenience of the parties, but the contract was one to carry from London to Antwerp and back with Brussels as a stopping place, both on the outward and on the return journey. The air carriers reserved the right to change the stopping places in case of necessity, as they might have to face natural conditions which would make the flight impossible. The contract was one for the whole transit and not independent contracts for separate stages. It is one contract with several stages for the tour. There is no substance in the idea that Antwerp could not be regarded as a stopping place. The contract was for a return journey at an inclusive fare of £6 8s. 0d. The fact that on one part £4 is stated, and on the other £2 8s. 0d., is only for the purpose of informing the passenger how much he will get back if he does not use the return half of the ticket. The fare was paid as a unit and the attempt to read it as showing that the parties had contracted, within the meaning of the Act of 1932, for a flight from London to Antwerp and a separate and independent carriage from Antwerp to London, was pushing the matter beyond a point which it could bear. The words of the convention make it quite plain that it is a contract of international carriage. The form of the ticket is

immaterial, because the convention expressly states that any irregularities in the ticket are not to affect the position. On the question of negligence, there is not sufficient material to justify an affirmative finding of negligence. It has been held by the learned judge that not going back to Brussels was negligence. That view of the position was not justified, having regard to all the circumstances.

GREER, L.J. : This is an appeal by the defendants from the judgment of LEWIS, J., whereby he awarded to the plaintiff for herself and her daughter, as dependants, £4,000 damages in respect of a claim under the Fatal Accidents Act commonly known as Lord Campbell's Act. Mrs. Grein's late husband was killed in an accident in Belgium when travelling as a passenger in the defendants' aeroplane the "Apollo," through the aeroplane colliding with the large wireless station near Ruysselede. The plaintiff alleged that the death of her husband was due to the negligent management of the aeroplane. The defendants by their defence as it was after the amendment at the trial raised the following defences : (i) They denied all the allegations of negligence. (ii) They alleged that the case was one of international carriage within the meaning of the Carriage by Air Act, 1932, which gave the force of law to articles agreed to at the convention of Warsaw. (iii) They relied alternatively on a clause in the contract as putting an end to the right of action of the deceased, and therefore barring the dependants from bringing an action based on Lord Campbell's Act. The action was partly heard before the Long Vacation in 1935, and resumed in the following Michaelmas Term. Until the action was resumed after the Long Vacation the defendants had not by their pleadings or at the hearing raised the point that the case was governed by the Carriage by Air Act, 1932, but they were allowed to amend their defence to raise this question, the plaintiff having also leave to amend her claim. The statement of claim was then amended by claiming in the alternative the English equivalent of 125,000 French francs, i.e., £1,670, the amount to which the rights of the dependants were limited if the case was held to be one of international carriage.

I propose to consider the second and third questions before dealing with the judge's findings of negligence. It is necessary to state in some detail the facts proved before the Court of Appeal with reference to the contract made between the late Mr. Grein and Imperial Airways, Ltd. At the hearing of the action the legal advisers of the plaintiff and the defendants thought that the ticket taken out by Mr. Grein was a return ticket to Brussels and back, and a copy of a return ticket to Brussels was accepted by both sides as representing the ticket taken by the deceased. Before the case reached the Court of Appeal it was discovered that a mistake had been made, and that the ticket which had been taken out—the outward half of which had been given up at Antwerp—

was a return ticket to Antwerp. When this appeared, we thought it right to admit evidence of the circumstances attending the taking of the return ticket to Antwerp. It was proved that the deceased had on Dec. 15, 1933, applied to Messrs. Cook's representative at 30, Mincing Lane, London, for a ticket to Antwerp and back. At this agency Messrs. Cook's local agent did not issue a ticket, but secured a reservation, accepted payment of the amount payable for a return ticket to Antwerp, in accordance with the advertised price, and gave the applicant a voucher which he could exchange at the defendants' office at Victoria Station for a ticket. The deceased paid to Messrs. Cook's agent the sum of £6 8s. 0d., which was the advertised price of a return ticket to Antwerp, and received from him a voucher in the following form :

Form No. 293B.

No. GB/EVB 12482.

Head Office :

EXCHANGE

IMPERIAL AIRWAYS LTD.

VOUCHER B

This original for passenger

and/or subsidiary &
associated Companies.

Airway Terminus

Victoria Station

London, S.W.1.

Telephone Victoria 2211

Telegrams. Impairlim.

To the Booking Clerk :—

IMPERIAL AIRWAYS Ltd.

Date 15-12-33.

Victoria, S.W.

In exchange for this voucher please furnish Bearer Mr. J. T. Grein with one 15 day return ticket by air from London to Antwerp via Brussels valid for 23rd December 1933 at 9.30 hrs.

Amount of fare(s) £6-8-0

Amount paid £6-8-0

Balance (if any)

to be paid on

receipt of

ticket(s)

£

THOS COOK & SON LTD. Agent.

15th Dec. 1933

30, MINCING LANE, E.C.3 Office

NOT TRANSFERABLE—Issued subject to the terms and conditions
printed overleaf.

On the back of the voucher there were printed these words :—

Terms and Conditions. This voucher must be presented at the office on which it is drawn. It is issued subject to accommodation being available, and to any adjustment of fares which may occur before date of presentation, owing to change of route or alteration in rates or any other circumstances. This voucher is issued by Imperial Airways, Ltd., its subsidiary companies, and/or their agents on the express condition that the contract of carriage hereby contemplated is

subject to the general conditions of carriage of passengers and baggage, which are applicable to both internal and international carriage. These general conditions of carriage are based upon the convention of Warsaw of Oct. 12, 1929, in so far as concerns international carriage within the special meaning of the said convention. The said conditions are available for inspection at the company's offices, and an extract therefrom is printed upon the cover of the ticket to be issued in exchange for this voucher.

On Dec. 16 Mr. Grein went to the defendants' office at Victoria Station, where he received in exchange for the voucher a ticket, the outward part of which is as stated hereunder. The ticket consisted of three parts marked C, B and A, C being the counterfoil for the passenger to keep, B the part which he had to give up at the destination, and A the part which he has to give up at the place of departure. The only parts that could be reproduced in court were parts A and B. The following is a true copy of parts A and B :

Imperial Airways Ltd. A.			IMPERIAL AIRWAYS LIMITED. B. and/or Subsidiary Companies.		
No.	GB/OCR	(a)	No. GB/OCR.510544 (a)	Fare £4	
Fare	£4		Passenger's Name	Mr. J. T. Grein	
From	London		From	London	
To	Antwerp		To	Antwerp	
Valid for			Agreed Stopping Places :		
Date	23/12/33		As per Company's Timetable		
Car Departure	08.45		Name and address of Carrier or Carriers :		
Air	09.30		Sabena, Brussels		
Service			For Conditions of Carriage : See Back		
15 day Agent			Valid for { Date, 23/12/33 Agent		
I.A.L. Stamp			Departure : Car, 08.40		
			Air, 09.30		
For Airport of Departure			Service		
			Place of issue		
			Date of issue		
			For Airport of Destination		

On the back of B appears :

The contract of carriage is subject to the general conditions of carriage of passen-

gers and baggage, which are applicable to both internal and international carriage. These general conditions of carriage are based upon the convention of Warsaw of Oct. 12, 1929, in so far as concerns international carriage within the special meaning of the said convention. An extract from these conditions is printed upon the cover of this ticket.

It is impossible to reproduce part C as this was retained by the passenger, and was probably lost with him. This, however, is unimportant, the most material portion of the outward part of the ticket being the portion marked B. With regard to the return portion of the ticket, the only part that could be produced was that which is marked A, being the part given up by the passenger on taking his place in the aeroplane at Antwerp. Part A of the return half of the ticket was in the following words :

Imperial Airways Ltd. A.		
No.	GB/OCR	(b)
	510544	
Fare	£2 8s.	
From	Antwerp	
To	London	
Date	Valid for	
	30/12/33	
Car Departure	11th	
Air "	SAB/I.A.L.	
Service	501A	
15 day RETURN Agent I.A.L. Stamp		
For Airport of Departure		

No doubt the other two parts of the ticket were similar in form to the outward part, with the difference that the journey would be described as from Antwerp to London instead of London to Antwerp, and there would be a reference in part A to an airport of departure, and in part B to an airport of destination. It seems clear that until Imperial Airways,

Ltd., issued a ticket to Mr. Grein in exchange for a voucher they made no contract with him to carry him to Antwerp on the proposed date, and back to London if he presented himself for the return journey in the period of fifteen days. If no accommodation was available, Imperial Airways, Ltd., could have refused to issue him a ticket; if it was available on the date mentioned the proposing passenger would be entitled to receive a ticket incorporating the general conditions, and when issued the ticket and general conditions would constitute the contract of carriage entered into between the traveller and Imperial Airways, Ltd. It seems quite clear that if a passenger took one ticket outwards for London to Antwerp and another inwards for Antwerp to London, neither the carriage from London to Antwerp nor the carriage from Antwerp to London would be international carriage. I cannot see that if the passenger pays for both journeys in advance when he buys his ticket for the two journeys in London at a reduced fare, this can be held to make the return journey international carriage. Both on the outward half and on the inward half the following words were endorsed:

The contract of carriage is subject to the general conditions of carriage of passengers and baggage, which are applicable to both internal and international carriage. These general conditions of carriage are based upon the convention of Warsaw of Oct. 12, 1929, in so far as concerns international carriage within the special meaning of the said convention. An extract from these conditions is printed upon the cover of this ticket.

Thus each half of the ticket contained a complete record of the undertaking of Imperial Airways, Ltd., with regard to the journey or carriage to which it applied, whether outward or return. Art. 2 of the general conditions so far as material is as follows:

Para. 1: Before he begins his journey the passenger must be provided with a passenger ticket. Para. 2: The passenger is bound to retain his ticket throughout the journey. He must when required produce it to any official in charge and surrender it at the end of the journey. Para. 3: (1) The passenger ticket shall contain the following particulars: (a) the place and date of issue; (b) the places of departure and destination; (c) the name and address of the carrier or carriers. The passenger ticket shall contain also the name of the passenger and the amount of the fare.

The paragraphs apply to all contracts of carriage whether international or not. Para. 3 (2), (3) reads as follows:

(2) So far as concerns international carriage, as defined by art. 1, para. 2, the passenger ticket shall contain in addition the following particulars:

(d) the agreed stopping places, for which summarised descriptions published by the carrier may be used;

(e) a statement that the carriage is subject to the rules relating to liability set out in the convention of Warsaw of Oct. 12, 1929, upon which these conditions are based.

(3) The carrier has the right to alter the agreed stopping places in case of necessity

without any such alteration having the effect of depriving international carriage as defined by art. 1, para. 2, of its international character within the meaning of this provision.

These sub-paragraphs refer only to a contract for international carriage. Art. 13 provides as follows :

Art. 13. Conclusion of the contract of carriage. Para. 1 : Except as provided by art. 2, para. 6 and art. 9, para. 3, the contract of carriage is made effective immediately on acceptance by the passenger of the passenger ticket, and, so far as concerns the carriage of baggage, the baggage check.

Art. 16 is in the following words :

Refunds. Para. 1 : No claim for refund of the fare paid for carriage can be entertained when a traveller does not arrive or arrives late for a journey for which a reservation has been made. Para. 2 : If a flight is cancelled owing to meteorological conditions or for any other reason, or if the aircraft returns to the airport of departure with the passenger, the latter shall be entitled to the return of the fare paid for the carriage of himself and his baggage. Para. 3 : In the event of a flight being interrupted the passenger is entitled to the return of a proportion of the fare paid for himself and his baggage corresponding with the non-flown mileage, unless the carrier completes the carriage by other means or makes himself responsible for the cost of forwarding by another means of transport. In such event he shall only be liable to refund the difference in fare, if any. Para. 4 : All rights to refund are extinguished unless a claim is made within a period of three weeks from the date fixed for the journey.

I reserve consideration of the articles relating to the liability of carriers, as they appear to me to be material only to the third question raised by this appeal.

For the definition of international carriage reference must be made to art. 1 (2) of the convention which is given the force of law in the territories of the United Kingdom by the Carriage by Air Act, 1932. Sect. 1 of the Act reads as follows :

1. Provisions of convention to have force of law. (1) As from such day as His Majesty may by order in council certify to be the day on which the convention comes into force as regards the United Kingdom, the provisions thereof as set out in sched. I to this Act shall, so far as they relate to the rights and liabilities of carriers, passengers, consignors, consignees and other persons and subject to the provisions of this section, have the force of law in the United Kingdom in relation to any carriage by air to which the convention applies, irrespective of the nationality of the aircraft performing that carriage. (2) His Majesty may by order in council from time to time certify who are the High Contracting Parties to the convention, in respect of what territories they are respectively parties and to what extent they have availed themselves of the provisions of the additional protocol to the convention, and any such order shall, except in so far as it has been superseded by a subsequent order, be conclusive evidence of the matters so certified. (3) Any reference in the said sched. I to the territory of any High Contracting Party to the convention shall be construed as a reference to the territories subject to his sovereignty, suzerainty, mandate or authority, in respect of which he is a party. (4) Any liability imposed by the said sched. I, art. 17, on a carrier in respect of the

death of a passenger shall be in substitution for any liability of the carrier in respect of the death of that passenger either under any statute or at common law, and the provisions set out in sched. II to this Act shall have effect with respect to the persons by and for whose benefit the liability so imposed is enforceable and with respect to the manner in which it may be enforced. (5) Any sum in francs mentioned in the said sched. I, art. 22, shall, for the purposes of any action against a carrier, be converted into sterling at the rate of exchange prevailing on the date on which the amount of any damages to be paid by the carrier is ascertained by the court.

As I read subject. (4) it only applies to a case of liability arising out of a contract for international carriage, and has no application to a contract for a carriage that is not international. Sched. I, art. 1 (2) defines international carriage as follows :

(2) For the purposes of this convention the expression "international carriage" means any carriage in which, according to the contract made by the parties, the place of departure and the place of destination, whether or not there be a break in the carriage or a transshipment, are situated either within the territories of two High Contracting Parties, or within the territory of a single High Contracting Party, if there is an agreed stopping place within a territory subject to the sovereignty, suzerainty, mandate or authority of another power, even though that power is not a party to this convention. A carriage without such an agreed stopping place between territories subject to the sovereignty, suzerainty, mandate or authority of the same High Contracting Party is not deemed to be international for the purposes of this convention.

At all material times Belgian territory was not the territory of a High Contracting Party.

The accident in which Mr. Grein lost his life occurred at the wireless station near Ruysselede in Belgium, and to bring the "carriage" or journey within the schedule, the carriage or journey must be one which by the contract was one from London to London via Antwerp as a stopping place. In my judgment the "carriage" which was in course of being performed by the respondents' aeroplane at the time of the accident was plainly by the terms of the contract not a carriage from London to London, with a stopping place at Antwerp. The contract, in my judgment, was one in which Imperial Airways, Ltd., undertook to carry the deceased from London as the place of departure to Antwerp as the destination, with an additional undertaking, subject to certain conditions, to carry him back from Antwerp to London. With all respect to those who differ from me, I think the contract was a contract to carry Mr. Grein to Antwerp, with a stopping place at Brussels (see timetable) and to carry him back from Antwerp to London if he complied with certain agreed conditions (which it is unnecessary for the present purpose to specify), with a stopping place at Brussels. If I take a ticket at Euston for Liverpool, Euston is my station of departure and Liverpool my destination, whether I take a single ticket or a return ticket. Suppose, for the sake of illustration, I have taken a return ticket. The porter

at Euston asks me what is my destination, my answer would be Liverpool. If I ask him what are the stopping places on the journey he would probably in most cases say Rugby and Crewe, he would certainly not say Liverpool. It would, in my opinion, be a misuse of language to describe the journey I was about to take as a journey from Euston to Euston with a stopping place at Liverpool. In the present case the return part of the ticket cannot be produced as it was destroyed with the passenger, but we have the outward half given up at Antwerp, and the part of the inward half given up at Antwerp when Mr. Grein took his seat in the ill-fated "Apollo," and we are entitled to conclude that the destroyed ticket was in the same terms as the part given up at Antwerp. The outward half describes the carriage or journey as from London to Antwerp with agreed stopping places as per company's time table. The only stopping place in the time table is Brussels. The ticket contained partly in print and partly in writing "Return valid for 15 days," and stated the fare (for the outward journey) as £4. As appears from the part of the return half "A" the fare is stated to be £2 8s. 0*d.*, and the journey as one from Antwerp to London. The specimen ticket used at the trial under the impression that the ticket was to Brussels and back, shows that the return half to be given up at Croydon or maybe at Victoria, contained the words "Agreed stopping places as per company's time table." In my judgment, the contract made by the company with Mr. Grein was to carry him by aeroplane from Croydon to Antwerp, with an agreed stopping place at Brussels, with an additional undertaking subject to certain conditions to carry him back for a fare of £2 8s. 0*d.* from Antwerp to Croydon, with a stopping place at Brussels. If this be right, the journey on which he met with his death was not international carriage, and the plaintiff's claim is not limited to 125,000 francs.

If it be suggested that the statute falls to be interpreted in the light of the articles of the Warsaw Convention this is indeed true to this extent, that if there be any doubt or ambiguity in the language used, the statute should be so interpreted as to carry out the express and implied provisions of the convention. But in my judgment the definition contained in the convention makes the character of the carriage or journey depend on the contract entered into by the passenger with the carrier. In the present case the contract seems to me clearly to be a contract for two carriages, as I have already stated. If it be said that so to construe the statute and the contract leaves unsolved a problem that the convention was intended to solve, i.e. the problem of deciding which law should be applied to liability for "accident," this problem is definitely not solved in the case of a return ticket from Antwerp to London, nor in respect of a single ticket either way, and it is accordingly wrong in my opinion to assume that the convention was intended, in the case of carriage between

the territory of a High Contracting Party and that of a non-contracting party, to avoid the difficulty of deciding which law should apply. It falls too far short of fulfilling such intention to justify the assumption.

The appellants' second contention raises a question of very great difficulty. If it be right, the remedy of the plaintiff under Lord Campbell's Act is entirely barred, and she will be worse off than if the contract be one of international carriage. It is contended that Lord Campbell's Act only applied to acts, neglects or defaults which are torts, and has no application to a claim based on breach of contract, even though the breach be a breach of an undertaking to carry with reasonable skill and care, and two cases mentioned in the judgment of LEWIS, J., were specially relied on. It is plain from the express words of Lord Campbell's Act that if for any reason the deceased could not have brought any action for his own damages at the time of his death, the dependants have no right of action. And, argued the appellants, by art. 18, para. 5, the deceased having given up all his rights of action otherwise than under the contract, the failure to perform their contract was not an act, neglect or default for which, had he lived, Mr. Grein could have maintained an action and recovered damages. The argument was in two parts. First, it was said that the words "act, neglect or default" referred only to acts, neglects or defaults that are torts, and do not refer to acts, neglects or defaults that are mere breaches of contract, and it was argued in the second place the only breach of contract in respect of which Mr. Grein could have claimed was the breach of a promise to pay him damages if he was injured by accident, and that this breach—the failure to pay damages—was not the cause of his death. It is therefore important to decide in the first place what was the nature of the breach of contract which would have given rise to a claim for damages by Mr. Grein if he had been hurt instead of being killed.

Art. 18, para. 2 says :

The liability of carriers under the provisions of art. 19, para. 1 (1) (a) applies to accidents occurring on board the aircraft or in the course of any of the operations of embarking or disembarking.

Then para. 5 says :

Passengers and baggage are accepted for carriage only upon condition that, except in so far as liability is expressly provided for in these conditions of carriage, no liability whatsoever is accepted by the carriers, or their employees, or parties or undertakings employed by them in connection with their obligations, or their authorised agents, and upon condition that (except in so far as liability is expressly provided for in these conditions) the passenger renounces for himself and his representatives all claims for compensation for damage in connection with the carriage, caused directly or indirectly to passengers or their belongings, or to persons who, except for this provision, might have been entitled to make a claim, and especially in connection with surface transport at departure and destination, whatever may

be the legal grounds upon which any claim concerning any such liability may be based.

Then art. 19, para. 1 (1) (a) says :

In the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger.

Then para. 1 (3) says :

Carriers are not liable if they prove that they and their agents have taken all necessary measures to avoid the damage, or that it was impossible for them to take such measures. In the carriage of baggage the carriers are not liable if they prove that the damage was occasioned by negligent pilotage or negligence in the handling of the aircraft or in navigation, and that, in all other respects, they and their agents have taken all necessary measures to avoid the damage.

Then para. 2 (1) says :

In the carriage of passengers the liability of carriers for each passenger is limited to the sum of 125,000 francs unless a larger sum has been agreed upon. Where, in accordance with the law of the court seised of the case, damages may be awarded in the form of periodical payments, the equivalent capital value of the said payments shall not exceed 125,000 francs.

The contract seems to me to mean that the carrier promises to be liable for damage due to accident provided that he is not to be liable if he proves that by his agents or servants he exercised all reasonable skill and care in taking all necessary measures to avoid causing damage by accident to the passenger, or proves that it was impossible to take such measures. This seems to me to amount to a promise not to injure the passenger by avoidable accident, the onus being on the carrier to prove that the accident could not have been avoided by the exercise of reasonable care (see per LORD DUNEDIN in *City of Montreal v. Watt & Scott, Ltd.* (1), hereinafter referred to). Damages are payable for breach of contract not because the contract is to pay damages, but by reason of a breach of contract in respect of which the court awards damages. By the finding of the learned judge, with which I agree (as will shortly appear), I think it was sufficiently proved that the appellants failed to exercise the measure of skill and care required of them, and thereby broke their contract with Mr. Grein, and would have been liable to him for such breach if he had survived. Lord Campbell's Act provides as follows :

Whereas no action at law is now maintainable against a person who by his wrongful act, neglect, or default may have caused the death of another person, and it is oftentimes right and expedient that the wrongdoer in such case should be answerable in damages for the injury so caused by him : Be it therefore enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present parliament assembled, and by the authority of the same, that whensoever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would

(if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony.

In my judgment the liability arises where the wrongful act is a breach of contract to exercise reasonable care, and if the death of a passenger is occasioned thereby an action lies under Lord Campbell's Act on behalf of the dependants there mentioned. A failure to exercise reasonable care is a "neglect," whether the duty to exercise such care arises from contract or tort. It is a wrongful neglect if it be a breach of contract, even though the contract prohibits an action of tort.

The two cases relied on, *Haigh v. Royal Mail Steam Packet Co. Ltd.*, (2), and *The Stella* (3), are not applicable, as in those cases the deceased in respect of whose death the actions were brought, had given up for good consideration all claims, whether in contract or tort. The principle of law from which the rule *Actio personalis moritur cum persona* is derived was considered in *Baker v. Bolton* (4), and in *Admiralty Commissioners v. S.S. Amerika* (5), it was based on a long settled rule of law that in a civil court the death of a human being cannot be complained of as an injury: see per LORD SUMNER, at p. 50. The object of Lord Campbell's Act was to get rid of the rule that no cause of action could arise from the death of a third person by wrongful act, neglect or default as that was a public wrong and not a private injury. There is no report of any case deciding that where negligence gives rise to a claim for breach of contract, Lord Campbell's Act gives no remedy to dependants. In my judgment a liberal interpretation should be given to the Act, and the words "act, neglect, or default" should be held wide enough to include a negligent breach of contract.

In *City of Montreal v. Watt & Scott, Ltd.* (1), LORD DUNEDIN in interpreting the words contained in the Canadian Code with regard to liability imposed on those who had things under their control, stated that in their Lordships' view the words "unable to prevent the damage complained of" meant "unable by reasonable means. It does not denote an absolute inability." These words seem to me to be applicable to art. 18 of the general conditions. The result of this is, in my judgment, that the appellants undertook liability for what are described in the contract as accidents unless they were able to establish that they could not by reasonable means have avoided causing the damage. The effect of this is to put upon them the obligation of disproving negligence, leaving them liable for damages for negligence if they failed to disprove it. Even without the assistance of LORD DUNEDIN's judgment I think this is the right construction to give to the article in question, otherwise the person suffering damage by accident would be able to recover unless the de-

dependants established that nothing whatever that they could have done would have prevented the damage complained of. The damage would not have occurred if the aeroplane had not started on the day in question, even though, as the judge has found, it was quite reasonable and proper for the aeroplane to start. The learned judge has summarised with great care all the facts relating to the question whether negligence was sufficiently proved. It seems to me quite clear that the deceased man, while retaining his own right to sue for damages, binds his dependants by his contract. They are not prevented from suing in cases in which he has given up his rights, because they are bound by the deceased's contracts, but because by the express words of the statute their right to sue for their damages is subject to the deceased having had a right to sue for his own damages at the date of his death. But an agreement by the deceased to limit his damages is not binding on the dependants. In *Nunan v. Southern Ry. Co.* (6), SCRUTTON, L.J., says at pp. 227, 228 :

The Fatal Accidents Act, has, I think, been interpreted, by authorities which are binding on us, to mean that the dependants have a new cause of action, yet cannot recover on that cause of action unless the deceased had at the time of his death a right to maintain an action and recover damages for the act, neglect or default of which they complain. He may have lost such a right in a number of ways ; he may have been guilty of contributory negligence ; he may have made a contract by which he excluded himself from the right to claim damages, and in such a case as that the decisions in *Haigh v. Royal Mail Steam Packet Co.* (2) and *The Stella* (3) show that the right of his dependants would be also barred. Again, he may have lost his right from failure to make a claim within the period limited by some statute ; or he may have lost it by reason of a release by accord and satisfaction. In all these cases, if he could not have brought an action at the time of his death neither can his dependants. Then it is argued that if that is so his dependants must equally be bound if he has made an agreement which, while leaving him a cause of action, limits the amount which he can recover. I agree that it looks odd that he should be able to bar his dependants entirely, and yet should not be able to bar them in part, but one must be guided by the words of the statute. The moment one attempts to transfer the provisions as to the amount of the liability (as distinguished from the liability itself) from the contract of the deceased to the rights of his dependants one gets into a difficulty. For their damages are not the same as the damages of the deceased ; they are calculated on quite a different principle. . . . Under these circumstances we must follow the language of the statute, and that language compels us to say that as the dead man could at the time of his death have brought an action for some damages his dependants can bring an action for their own and quite different damages. I agree that the appeal must be dismissed.

ATKIN, L.J., says at pp. 229, 230 :

The words of the section are satisfied ; the man had at the time of his death a right to maintain an action and recover some damages ; and that is enough. The answer to the former alternative is that the dependants under the Fatal Accidents Act have an entirely different cause of action from that which the deceased person had. In the words of LORD BLACKBURN in *The Vera Cruz* (7), their cause of action is " new in its species, new in its quality, new in its principle, in every way

new." Under those circumstances, if the contract made by the deceased is only a contract that puts a limit to the amount of the damages that he can recover, it is difficult to see how that can have any relation to a claim made by the dependants on a different cause of action and in respect of a different measure of damages. The circumstances may be entirely different. The deceased person could, if he were alive, only bring an action to recover compensation for his own personal injuries, which *ex hypothesi* fall short of the consequences of his death. . . . For my part I fail to see any logical relation between the fact that there is a limit to the damages which the deceased person could have recovered and the amount of the damages recoverable by the dependants.

I agree with the view of LEWIS, J., that there was no negligence before Gittins the pilot sent his unavailing message asking for his bearing, and I also agree with his conclusion that after the pilot failed to get any message from Haren he was guilty of negligence in continuing his flight at a height below the height of the wireless masts instead of trying to get above the cloud, or if that was too dangerous, turning round to go back to Haren. He must have known that he was approaching the vicinity of the wireless station. He had lost his way and did not know whether he was south or north of the railway, and he chose the least prudent of several courses open to him.

It was further argued by Mr. Robertson that we ought to hold the damages excessive. I think the judge's estimate was not an unreasonable estimate of the loss which in all probability the widow and daughter of Mr. Grein suffered by his death, and I see no reason why we should order a new trial on the ground of excessive damage. I refer to what I said in *Flint v. Lovell* (8), as to the considerations that ought to weigh with the Court of Appeal when asked to order a new trial on the ground that the damages awarded are too large. I fail to see any good ground for regarding them as excessive in the present case. The learned judge had to consider the probability of a successful business man like Mr. Grein recovering from the effect of the slump and regaining his ability to earn a large income out of which he might be expected to make adequate provision for his wife and daughter.

If my judgment prevails, the appeal will be dismissed with costs.

GREENE, L.J. : The Carriage by Air Act, 1932, was passed for the purpose of giving binding effect in this country to the convention signed at Warsaw on Oct. 12, 1929, a translation of which (omitting the preamble) is set out in the schedule to the Act. In approaching the construction of such a document as this convention it is, I think, important at the outset to have in mind its general objects so far as they appear from the language used and the subject matter with which it deals. The object of the convention is stated to be "the unification of certain rules relating to international carriage by air." By "unification of certain rules" is clearly meant, "the adoption of certain uniform rules," that is to say,

rules which will be applied by the courts of the High Contracting Parties in all matters where contracts of international carriage by air come into question. The rules laid down are in effect an international code declaring the rights and liabilities of the parties to contracts of international carriage by air; and when by the appropriate machinery they are given the force of law in the territory of a High Contracting Party they govern (so far as regards the courts of that party) the contractual relations of the parties to the contract of carriage of which (to use language appropriate to the legal systems of the United Kingdom) they become statutory terms.

The desirability of such an international code for air carriage is apparent. Without it, questions of great difficulty as to the law applicable to a contract of international carriage by air would constantly arise. Our courts are familiar with similar questions arising under contracts of through carriage otherwise than by air; and it is easy to imagine cases where questions of the greatest difficulty might arise as to which law or laws governed the contract and whether different laws might not apply to different stages of the journey. So far as regards questions which have arisen in our courts I need do no more than refer to such well known cases as *Peninsular & Oriental Navigation Co. v. Shand* (9), and *Cohen v. South Eastern Railway Co.* (10), and to the discussion of the subject in DICEY'S *CONFLICT OF LAWS*, 5th Edn., beginning on p. 693. It is not too much to suppose that similar questions would arise in the courts of foreign countries; and it may well be that those courts would follow principles different from our own in deciding the proper law applicable in the various cases which might arise. In the case of air carriage examples of the confusion which might arise in the absence of an international code readily suggest themselves. Thus different laws might be held to apply according as a ticket (to take a simple case) was taken in Paris for a flight to London or in London for a flight to Paris, according as the carrier was a French or an English company, according as an accident took place in England or in France. Where the carriage is effected by stages covering several countries and involving aeroplanes belonging to companies incorporated in several countries, the difficulties increase as well as the unlikelihood of finding in the various countries in which actions might be brought any uniformity of legal principles for their decision. It is, I think, apparent from the subject matter with which the convention deals and from its contents that the removal of these difficulties by means of a uniform international code, to be applied by the courts of the various countries adopting the convention, is one, at any rate, of the main objects at which the convention aims; and it is in my judgment essential to approach it with a proper appreciation of this circumstance in mind.

The convention is limited to international carriage. There was no

necessity for any agreement as to carriage performed within the territory of one state ; nor was it thought necessary to deal with the case where an aeroplane performing the contract of carriage began and ended its journey in the territory of the same state without coming to earth, even if during its flight it passed over the territory of another state. In such a case difficulties as to the law applicable would not be likely to arise ; in this country at any rate it could scarcely be said, for instance, that a contract to carry a passenger direct from London to Gibraltar without an intermediate landing (were such a flight possible) would be affected in any way by French law by reason of the fact that the machine in the course of its flight passed over French territory or made a forced landing therein. It was not considered useful to class as international carriage cases where the carriage begins in the territory of a state adopting the convention and ends in one which does not adopt it or *vice versa*. The reason, I think, is that the courts of the non-adopting state would not be bound by the convention and there would accordingly be no possibility of uniformity of decision. The fact that in cases such as this the convention does not apply, is in my judgment no argument in favour of the view that the present case is not one of international carriage.

On the other hand, where the contract of carriage provides for a descent in foreign territory, the fact that the carriage begins and ends in territory belonging to the same state, would not necessarily prevent questions from arising in the courts of that state as to the law applicable to that part of the flight which took place over the foreign territory in question. Accordingly the convention makes express provision for this case. To take an example, any one who takes a ticket for a flight from Berlin to (say) Königsberg in East Prussia under terms of carriage providing for an intermediate descent upon Polish territory in the Corridor will know that his contract with the carrier will be held by German courts to be governed by the code and that no question of Polish law will arise ; and this would be so whether or not Poland was a party to the convention. The reason for confining the application of the convention where the carriage begins and ends in the territory of the same state to cases where descent in the territory of another state is provided for by the contract of carriage is sufficiently obvious. It is, I think, that where the descent in the territory of another state was involuntary, no question of the applicability of the law of that state to the contract of carriage would be likely to arise.

Bearing in mind these general considerations as to the manifest object of the convention I turn to a closer examination of its more important terms. The definition of international carriage is contained in art. 1 (2), (3). Para. (2) at the outset begins the definition by reference to the contract itself. This indeed is what would be expected, seeing that the convention lays down rules governing the terms and operation of

contracts of carriage which will be enforced in the courts of the High Contracting Parties. The rules are rules relating not to journeys, not to flights, not to parts of journeys, but to carriage performed under one (or in cases falling under para. (3) more than one) contract of carriage. The contract (or under para. (3) the series of contracts) is, so to speak, the unit to which attention is to be paid in considering whether the carriage to be performed under it is international or not.

It is next to be observed that the fact that there is a break in the carriage is immaterial. In other words, once the contract is ascertained to be a contract for the class of carriage described, it matters not that the journey is broken. Thus, if the contract were for carriage of a passenger from Paris to Madrid it would make no difference if the passenger was entitled under the contract to break his journey at Toulouse: he might be entitled to remain at Toulouse for a week or a month and then resume his journey, the carriage would none the less satisfy the definition. The reason for this is clear once it is appreciated that the contract is the unit, not the journey. Such a traveller speaking without reference to the convention might well say, if asked by a fellow passenger on leaving Paris what his place of destination was, that it was Toulouse; but this would not alter the fact that his "place of destination" for the purposes of art. 1 (2) would be Madrid, since it is to Madrid that the carrier agrees to carry him. The fact that the contract between the parties is the primary matter to be regarded is made even clearer when para. 3 is examined. Under this paragraph the conception of the contract as being what I have called the unit is extended to include the case where there is a series of contracts provided the parties have regarded the carriage as a "single operation." In that case, the series of contracts is treated as the unit and the justification for so doing lies in the fact that the parties have regarded the carriage to be performed thereunder as a single operation, a justification which has its basis in reason and good sense.

The controversy upon this part of the case turned more particularly on the meaning of two expressions in para. (2), namely: "the place of departure and the place of destination," and "an agreed stopping place." Before turning to the application of these expressions to the actual contract in this case it is useful to make some general observations as to their meaning.

1. "*Place of departure and place of destination.*" The use of the singular in this expression indicates that in the minds of the parties to the convention every contract of carriage has one place of departure and one place of destination. An intermediate place at which the carriage may be broken is not regarded as a "place of destination." Having regard to its context, and particularly to the fact that it is in the contract that the place of departure and the place of destination are to be looked

for, the *prima facie* meaning of the expression appears to me to be "the place at which the contractual carriage begins and the place at which the contractual carriage ends." It is useful to test this construction by one or two examples. If the contract with the carrier provides that the passenger shall be carried on a voyage from Berlin to Konigsberg in East Prussia with a right to break the journey at some point of descent in the Polish Corridor, the contractual carriage begins at Berlin and ends at Konigsberg. Similarly if the contract is for a voyage from Berlin to Hamburg with a similar break in the Polish Corridor, the contractual carriage begins at Berlin and ends at Hamburg. If the contract is for a circular voyage, starting at Berlin, visiting various European capitals and ending at Berlin, the contractual carriage begins at Berlin and ends at Berlin. In this connection it is not unimportant to observe that art. 31 (1) provides that in the case of combined carriage performed partly by air and partly by any other mode of carriage the provisions of the convention apply only to the carriage by air. For the purpose therefore of ascertaining what are the place of departure and the place of destination carriage by motor car or train from the city to the aerodrome is to be disregarded—one aerodrome is the place of departure and the other aerodrome is the place of destination. It follows from this that just as in the Berlin-Hamburg example given above, Berlin is the place of departure and Hamburg is the place of destination, so if the contract is to carry the passenger from one aerodrome outside Berlin to a place in the Polish Corridor and back to another aerodrome outside Berlin, the former aerodrome is the place of departure and the latter the place of destination. In all these cases the same reason for the application of an international code exists. The desirability of excluding considerations, both of Polish law and of German law, and any possible conflict between them exists just as much in the cases Berlin-Corridor-Hamburg, Berlin-tour of European capitals-Berlin, 1st Berlin aerodrome-Corridor-2nd Berlin aerodrome, as it does in the case Berlin-Corridor-Konigsberg. In each case, when regard is had to the carriage which the carrier by his contract agrees to perform, the place where the contractual carriage begins and the place where it ends are clear beyond possibility of doubt.

2. "*Agreed stopping place.*" I have already referred to the significance which, in my opinion, is to be attached to the word "agreed." The expression "stopping place" cannot in my judgment be confined to cases where the aeroplane descends without any right in the passenger to break his journey. If two passengers leave Berlin in an aeroplane bound for Konigsberg, the contract providing for a descent of the machine in the Polish Corridor, and one of the passengers is and the other is not entitled to break his journey in the Corridor, it cannot be that the carriage is international in the case of the latter and not in the case of the former. In each case the Corridor is an agreed stopping place, although the rights

of the two passengers in relation to it are different. If I am right in thinking that the expression "place of departure and place of destination" means the place at which the contractual carriage begins and the place at which it ends, "agreed stopping place" means a place where, according to the contract the machine by which the contract is to be performed will stop in the course of performing the contractual carriage, whatever the purpose of the descent may be, and whatever rights the passenger may have to break his journey at that place. This interpretation of the expression "agreed stopping place" is one which gives full effect to what I have described as the real object of the convention. If the High Contracting Parties intended to exclude the possible application to the contract of the law of a country in which by the contract a descent is to take place, their intention would fall short of fulfilment if a distinction were to be drawn based on the reasons for the descent or the right of the passenger to break his journey, matters which are quite irrelevant in that connection.

Stress was laid on the fact that by art. 3 (1) (c) the carrier may reserve the right to alter the stopping places in case of necessity; and it was suggested that this provision would make it wrong, e.g., to treat Brussels as an agreed stopping place in the case of a return ticket from London to Brussels since a right in the carrier to substitute some other place, e.g., Antwerp for Brussels would be inconsistent with the contract. But this argument in my judgment goes too far. The same argument would apply in the case of the carriage Berlin-Corridor-Konigsberg, where the passenger has the right to break his journey at the agreed stopping place in the Corridor. The fact that in such a case the carrier reserved the right to stop at some place in the Corridor other than that stated in the contract would not in my judgment affect the matter one way or another. Moreover, the provision referred to is optional only; and if the carrier does not in the contract reserve the right to alter the agreed stopping place at which the passenger is to be entitled to break the carriage, the contract is broken if he stops not there, but at some other place.

The conclusion to which I have come is that the contract by reference to which the place of departure and the place of destination are to be ascertained may be any contract of carriage whether for a single journey, for a circular journey, or for a return journey; that the place of departure and the place of destination mean the places at which under the particular contract in question the contractual carriage begins and ends; and that agreed stopping place means any place at which under the particular contract the aeroplane is to descend in foreign territory between the points of departure and destination. In the case of a return journey this will be or include, as the case may be, the place out to and back from which by the contract the passenger is to be carried. In the case of

carriage of each type the same essential element is present, namely, the interposition between the beginning and the end of the contractual carriage of an agreed descent in the territory of another state. In each case the mischief requiring to be remedied by the adoption of an international code is the same, namely, the possibility of questions arising between the parties as to the law applicable to the contract which they have made. I cannot find any consistently intelligible meaning for the expressions which I have been discussing which stops short of that which I have placed upon them.

It is said that the expression "place of destination" is not a natural expression to use in reference to the homeward end of a return journey; and that agreed stopping place is not a natural expression to use in reference to the outward end of such a journey. But the question is not what is the natural meaning of these expressions in the abstract or in some other context but what is their natural meaning in this context. If my analysis of the context is correct I see nothing unnatural in the meaning which I have attributed to these expressions.

It must next be considered whether the contract in this case falls within the paragraph in question as I have construed it. In my opinion the contract is one contract, not two, and is a contract for the journey to Antwerp and back. I attribute no importance to the fact that the ticket is made up of two sheets of paper; nor to the fact that at the bottom of parts A and B respectively on each sheet the words "For airport of departure" and "For airport of destination" are printed. These are nothing more than indications to the passenger and directions to the officers of the company as to the points at which the parts in question are to be detached. They have no reference to the convention; and even if they had they could not affect the question whether or not the contract is one covered by the convention. Once the contract is found to be covered by the convention, what for the purposes of the convention would be a misdescription in the ticket cannot affect the matter one way or the other. Nor do I attach any importance to the fact that in part B of the outward part of the ticket (and probably also in part B of the homeward part) the space for "agreed stopping places" has inserted in it "as per company's timetable." If I am right in thinking as I do that for the purpose of a return ticket the outward end of the journey is an agreed stopping place within the meaning of the convention, no misstatement or misdescription in the ticket can affect the matter. Indeed, the convention itself so provides—see art. 3 (2).

The main argument upon the contract of carriage in this case was to the effect that it was a contract for two carriages, one out and one home. With all respect to those who think otherwise I find difficulty in appreciating this argument. If the contract is one contract (which, for the purposes of the argument is assumed) I do not see how it carries the

argument further to describe the contractual carriage for which it provides as "two carriages." It appears to me equally accurate to say that it is a contract for one carriage divided into two stages. But here again the question is not "is the contract a contract for two carriages" in some abstract sense—it is "is the contract a contract for two carriages for the purposes of the convention," which is a very different thing. There is nothing in the language of the convention to suggest that, once the parties have made a single contract for a carriage with a place of departure and a place of destination, the carriage contracted for will fall outside the convention merely because the parties have chosen to express their contract in language suggesting that in some abstract sense it is a contract for two carriages. Here again the answer to the argument is in my judgment to be found in the fact that the contract of carriage is the unit to be regarded.

In support of the argument reliance was placed upon the fact that in the ticket itself two sums are inserted as fares, one of £4 for the outward journey and one of £2 8s. 0d. for the homeward journey. I cannot myself see how this circumstance can convert the contractual carriage into two carriages for the purpose of the convention. If a passenger entered into a contract for carriage by air from London to Cologne with an agreed stopping place at Brussels—Germany being and Belgium not being a ratifying party to the convention for the purposes of this illustration—I cannot see how it could be said that the whole of the contractual carriage fell outside the convention, merely because the ticket delivered to the passenger happened to be in two sections on one of which was inserted the advertised fare from London to Brussels, and in the other of which was inserted the advertised fare from Brussels to Cologne. Yet upon the assumption made as to ratification this would be the result of the argument. In fact, if I have rightly construed the convention, there is no room for such an artificial splitting of the contractual carriage.

In the present case the object for which the two sums were inserted in the ticket is to my mind clear. Having regard to the terms of the document described as "European timetable," a passenger holding a return ticket is entitled (under cl. 6 on p. 2) to a refund of the difference between the single and the return fare in certain events. This right is in my judgment part of the contract between the parties, and whether it be regarded as part of the actual contract of carriage itself or as a contemporaneous collateral agreement it may, in my opinion, be looked at for the purpose of ascertaining what contractual effect if any is to be given to the separation of the fares as anything more than a convenient arrangement for the purpose of enabling the passenger's right to a refund to be carried into effect in a practical way. Although upon the question of construction it is probably not a matter which can be legitimately taken into account, it is consoling to observe that this con-

clusion avoids a result which would place the company in the position of handing to its passengers tickets conferring rights different to those which it offers in the timetable. That document offers to the intending passenger a return ticket. If I am right in thinking that a return ticket falls within the convention, and if the splitting of the fare upon the face of the ticket is sufficient to take it out of the convention by converting the contractual carriage into two carriages instead of one, then the ticket which the company hands to the passenger is not the ticket which in its timetable it offers to give.

In the result I have come to the conclusion that the liability of the defendants is limited to the sterling equivalent of a sum of 125,000 francs by art. 22 (1) of the convention and that this amount only should be awarded, it being divided between the plaintiffs in the proportions mentioned in the judgment of LEWIS, J.

But upon the assumption that this conclusion is not correct I must state my views upon the second point which arises in the appeal. If the contract is not a contract of international carriage within the meaning of the convention, it is a contract governed by the terms of the International Air Traffic Association Agreement. In so far as this agreement deals with carriage which, although for some reason (e.g., non-ratification) it does not fall within the convention, has nevertheless, what for short I may call, an international element, one of its manifest objects is to lay down a contractual code the effect of which will be to exclude the application of the laws of different countries and to substitute for them one universal code. In this respect the objects of the agreement resemble those of the convention which I have already discussed.

The argument of the respondents may be summarised as follows: (i) Under the contract there is an implied duty on the carrier to take care, (ii) breach of this duty is an "act, neglect or default" on the part of the carrier within the meaning of sect. 1 of Lord Campbell's Act, (iii) the limitation of liability to 125,000 francs laid down by art. 19, para. (2) (1) of the International Air Traffic Association Agreement is not binding upon the representatives of a deceased passenger in an action under Lord Campbell's Act: see *Nunan v. Southern Ry. Co.* (6), a decision which is binding on this court.

I am unable to agree with the first of these propositions. If there is under the contract an implied obligation on the carrier to take care it must be an obligation arising under the law of some country. In the case of carriage with an international element this at once opens the door to questions as to what law is to be considered for the purpose of ascertaining the extent of the duty, if any, questions which may well be answered in different ways with different results according as they arise in the courts of one country or another. In the case of journeys from London to Brussels, or *vice versa*, the passenger may find himself travelling

in a Belgian or a British machine according to the day of the week on which he travels. It may very well be that if he takes a ticket in London and the machine by which he travels is a Belgian machine the law held to be applicable to the contract by an English or a Belgian court, would be the law of Belgium by reference to which, upon the argument, the standard of duty would fall to be judged. On the other hand if the machine was a British machine an English court would presumably hold that English law was applicable, although if, e.g., the passenger was a Belgian and the accident took place in Belgium it does not follow that a Belgian court would necessarily take the same view. In the case of a return ticket the possibility of doubts and differences arising, particularly when the aeroplanes on the outward and homeward journeys belong to different nationalities, are even greater. So in the case of long journeys different stages of which are performed by machines belonging to different countries. Now, of course, these considerations do not justify a strained interpretation of the language of the contract. But it is, in my opinion, legitimate to bear in mind what upon the face of the International Air Traffic Association Agreement appears to be one of its main objects in considering what construction ought to be placed upon the language which it contains. When that language is considered it does in my judgment effect this object. Art. 18, para. 5, states in perfectly clear terms as a condition of the contract that

except in so far as liability is *expressly* provided for in these conditions of carriage no liability whatsoever is accepted by the carriers . . . and . . . the passenger renounces for himself and his representatives all claims for compensation for damage in connection with the carriage . . . whatever may be the legal grounds upon which any claim concerning any such liability may be based.

I have underlined the word "expressly" since it is, in my judgment, of great importance. The express provisions referred to are set out in art. 19. Under that article a liability is imposed upon the carrier not, as I construe it, to exercise care in performing the contract of carriage, but to pay a sum up to the limit specified if a passenger is killed or injured during the period of the carriage, unless he can escape this liability under art. 19 para. 1 (3). In other words, those responsible for framing the International Air Traffic Association Agreement adopted in my opinion the very sensible and convenient course of eliminating from the contract all considerations of a duty to take care, which might vary according to the law applicable to any individual case, and substituted for it what may be described as a modified system of insurance, under which carriers who kill or injure passengers are bound to make compensation unless they can prove that they have "taken all necessary measures to avoid the damage or that it was impossible for them to take such measures." It cannot be said that the imposition of the burden of proof upon the carrier is an inadequate compensation for the surrender

by the passenger of his right to base a claim upon some implied duty to take care. Art. 22 para. 4 (1) does not in my opinion cut down the clear effect of the paragraphs to which I have referred. I should add that it was not seriously argued that art. 18 para. 5 was not sufficient to exclude any liability in tort.

If my view is correct, the result will be that the plaintiffs are not entitled to recover anything since, if the contract is to pay money in the event of the death of the passenger unless certain facts are proved, it is not the breach of that contract which causes the death within the meaning of sect. 1 of Lord Campbell's Act. Upon the view which I take of the contract the questions raised by the second and third propositions do not arise, but I will shortly state my views upon them.

The second proposition raises a question of novelty and it is not an easy one. It is said in answer to it that the act, neglect or default dealt with by Lord Campbell's Act must be a tortious act and that if the death was due merely to a breach of contract the Act does not apply. In the ordinary case arising under Lord Campbell's Act where there has been a contract of carriage the question is really an academic one and this, no doubt, explains the fact that there is not, as it appears, any authority upon the point. In such a case in addition to the breach of contract there is a tortious act, neglect or default. But in the present case, having regard to the terms of the contract, liability *ex delicto* is excluded; and if, contrary to my view, there be an obligation to perform the carriage with due care it is contractual only. The question, therefore, is, is a breach of contract causing death an act, neglect or default which causes death within the meaning of sect. 1 of the Act? With some hesitation I answer this question in the affirmative. The word "default" is a word of wide signification and in its ordinary use does I think include a breach of contract.

The third proposition is based on *Nunan's* case (6). That was a case where the contract did not exclude liability *ex delicto*, it merely limited the company's liability. In other words the limitation of liability was by contract superimposed upon an existing duty to take care which independently of the contract arose from the fact that the company accepted the passenger. In the present case the contract excludes liability *ex delicto* and the liability is a liability *ex contractu* only which comes into existence with the limitation on the amount recoverable annexed to it. This distinction is, I think, too fine to enable me to say that *Nunan's* case (6) does not apply.

I have thought it right to express at length my views on the questions with which I have dealt not only because they are questions of great difficulty and importance, but because the views which I have formed are in important respects different from those expressed by the learned judge and by GREER, L.J., whose judgment I have had the advantage of

reading. I do not propose to burden this judgment by examining the facts, and I need only say that I am in entire agreement with the conclusions expressed by the learned judge in his most careful judgment, and with those of GREER, L.J., upon this branch of the case. I am also in agreement with their conclusions upon the question of damages.

TALBOT, J.: The chief material facts have been fully stated, and there is no need to repeat them. Nor is it necessary for me to dwell on the difficulty of some of the questions involved. The difference of opinion among the judges who have considered them is sufficient proof of it. Nor do I need to do more than state the embarrassment which it is to me to have to give what (so far as this court is concerned) is the deciding voice between the two judgments which have been read, so far as they differ.

Among these points of difference it seems natural to consider first the interpretation to be given to the expression international carriage in the convention signed on behalf of the British Government on Oct. 12, 1929. The convention has, by the Carriage by Air Act, 1932, s.1 (1), the force of law in the United Kingdom, in relation to any carriage by air to which the convention applies, so far as it relates to rights and liabilities of carriers and passengers, whatever be the nationality of the aircraft performing the carriage. It is set out (in English) in sched. I of the Act; and by art. 1 (1) it applies (amongst other things) to all international carriage of persons performed by aircraft for reward. Art. 1 (2) states the meaning of international carriage for the purposes of the convention. I need not read the whole paragraph again. To be international carriage, the carriage must, according to the contract made between the parties, have a place of departure and a place of destination, either situated within the territories of two of the High Contracting Parties to the convention, or, if they are both within the territory of one High Contracting Party, having an "agreed stopping place," "within a territory subject to the sovereignty, suzerainty, mandate or authority of another power," whether that power is, or is not, a party to the convention. (Compare the corresponding words in the general conditions published by the International Air Traffic Association, 1 A, art. 1, para. 2 (2)).

There was some confusion in the court below, caused no doubt partly by the destruction of material documents by the fire of Dec. 30, 1933, as to the exact nature of the contract under which Mr. Grein was travelling at the time of his death. I take the facts now established as being these, shortly stated: Mr. Grein on Dec. 15, 1933, procured at an office of Thos. Cook & Son, Ltd., in the city of London a paper (described as a "voucher") headed with the defendants' name, by which Thos. Cook & Son requested the booking clerk at the defendants' head office at Victoria

Station to give "Bearer Mr. J. P. Grein," "One 15 day return ticket to Antwerp via Brussels valid for Dec. 23, 1933." The amount of the fare (£6 8s. 0d.) is stated on the voucher as paid; it was the advertised price of a 15 day return ticket to Antwerp. It is to be noticed that the expression "return ticket," familiar to English travellers, is used in this document without explanation, and appears without any special definition in other documents used in connection with the defendants' system, e.g., the general conditions published by the International Air Traffic Association already mentioned p. 6, art. 2, para. 5, art. 4; European timetable p. 2, para. (6), pp. 5, 6, 7.

On the following day, Dec. 16, Mr. Grein received at Victoria in exchange for the voucher a ticket in three parts (one of which could not be produced at the trial, having presumably been destroyed in the fire which overtook the aeroplane). Extracts from the general conditions mentioned above appear on the cover of the ticket. The first of them states that the contract of carriage is subject to the general conditions.

It seems to me that this was one contract, made at one time and place, conferring a right to be conveyed, on the conditions stated in it, from London to Antwerp and back, via Brussels, and that this is correctly described as a contract and a carriage representing a journey of which London is the place both of departure and destination; and one therefore which a stop at an agreed stopping place in Belgium makes international carriage. No doubt to say that a carriage or a contract for carriage is from London to London is not an ordinary way of speaking, but it is what this contract and carriage in fact were; and I see no reason why the definition in art. 1 (2) of the convention does not apply. There is departure from London and destination to London, both in the territory of one High Contracting Party; and there is an agreed stopping place (or more than one) in foreign territory. I agree with GREENE, L.J., that there is no reason at all for not applying the words "agreed stopping place" to the most distant point of the total journey for which the contract provides. The words of the definition in my opinion apply, and all the qualities embodied in it would be included in what would ordinarily be called international carriage. I refer again to the description in the general condition of "special categories of international carriage." (In art. 1, para. 2 (2), on p. 5).

I may add that I find this opinion which I formed, before I had the opportunity of reading the judgments of the other members of the court, on the construction of art. 1 (2) of the convention taken by itself, strongly supported by the exposition of the objects and scope of the convention with which GREENE, L.J., has prefaced his judgment.

The effect of this is (see sect. 1 (4) of the Act of 1932) to make Lord Campbell's Act inapplicable to the disaster which is the subject of this action and substitute for its provisions for this purpose those of sched. I,

art. 17, and those of sched. II of the Act of 1932. In the circumstances of this case it was only necessary for the plaintiff under art. 17 of sched. I and sched. II to prove the necessary facts of the accident ; that Mr. J. T. Grein's death resulted ; and the kinship between him and those for whose benefit the action was brought. None of the defences allowed by the convention are proved ; but the liability is limited by art. 22 (1) to 125,000 francs (see sect. 1 (5) of the Carriage by Air Act, 1932) ; the plaintiff is therefore entitled to judgment for the equivalent of that sum to be divided in the proportions ordered by the judgment of LEWIS, J.

I have had the opportunity of considering the two full judgments which have been read and the result is that I agree, on all the material points of difference, with GREENE, L.J., and with his conclusions, both as to the actual decision, and in the various alternatives which he has mentioned. I agree in the decisions of fact on which the Lords Justices have expressed their agreement with LEWIS, J., and also as to the damages. if Lord Campbell's Act applies to the case.

Appeal allowed with costs. The appellants to have the general costs of the action down to the trial, and two-thirds of the costs of the trial. Leave to appeal to the House of Lords.

Solicitors : *Beaumont & Son* (for the appellants) ; *Wordsworth, Marr Johnson & Shaw* (for the respondent).

[*Reported by W. K. SCRIVENER, Esq., Barrister-at-Law.*]

PICK v. PALING.

[COURT OF APPEAL (Slessor, L.J., MacKinnon and Goddard, JJ.), July 14, 1936.]

Master and Servant—Workmen's Compensation—Redemption of weekly payment—Agreement both to provide work and to pay compensation—Basis of redemption.

An injured workman was paid full compensation at 22s. 10d. per week until Mar. 23, 1933. On Oct. 31, 1933, an agreement was entered into between the parties, whereby the employer agreed to employ the workman on light work at 2s. 6d. per day for eight months during the year and to pay compensation at 14s. 7d. per week. On Jan. 7, 1936, the employer applied to redeem the weekly payments on the basis of a weekly payment of 14s. 7d. per week, and the workman applied for a review of the award on the ground of a change of circumstances :—

HELD : (i) the agreement to provide light work and pay compensation must be regarded as a whole and the employers could not redeem on the basis of a weekly payment of 14s. 7d.

(ii) the employers should have asked for a review of the weekly payment and redemption, and the county court judge was not bound on an application for redemption on the footing of a weekly payment of 14s. 7d. to proceed to a review of the weekly sum.

(iii) the counter-application of the workman for a review did not oblige the county court judge to review the payment for the purposes of the employer's application to redeem.

[EDITORIAL NOTE.] Employers often desire to provide men with some light work at a wage and so reduce the amount of compensation payable to them. The fact that they do this, however, does not entitle them to redeem the compensation at the figure of the lower weekly payments then paid. If they desire to redeem, the compensation must be reviewed, and the redemption must be on the full compensation payable in respect of the man's incapacity for work.

AS TO REDEMPTION OF WEEKLY PAYMENTS, see HALSBURY, 1st Edn., Vol. 20, Master and Servant, pp. 229, 230, paras. 536-540; and FOR CASES, see DIGEST Vol. 34, pp. 460-463, Nos. 3769-3798.]

Case referred to :

- (1) *Clawley v. Carlton Main Colliery Co.*, [1918] A.C. 744; 11 B.W.C.C. 440; 34 Digest 461, 3775.

APPEAL by the applicant employer from the refusal of His Honour JUDGE FARRANT to redeem the weekly payments made to the respondent workman in consequence of an accident sustained in the course of his employment.

On Sept. 17, 1931, the respondent, an engine driver and labourer employed by the appellant, a farmer, sustained an injury to his right hand, whereby his first two fingers were amputated at the middle joint. The remaining fingers of the right hand became bent into the palm and fixed there, so that the hand eventually assumed the appearance of a clenched fist. The workman's average weekly earnings prior to the accident were £2 1s. 6d., and he was paid compensation from the date of the accident on the basis of total incapacity amounting to 22s. 10d., until Mar. 23, 1933. On this date he was offered light work at a wage

of 2s. 6d. a day, and his compensation was reduced to 14s. 7d. per week. At the hearing of the arbitration on Oct. 31, 1933, the employer stated that he was able to provide the workman with light work at the rate of 2s. 6d. a day for eight months in the year, and following negotiations an agreed award was drawn up. Following the agreed award the workman started his light work immediately after Oct. 31, 1933, and contrary to expectations the employer has provided this light work all the year round.

The employer applied for the compulsory redemption of the weekly payments under the Workmen's Compensation Act, 1925, s. 13. In his answer the workman submitted that a change of circumstances had taken place and applied that the compensation should be re-assessed, and this was treated at the hearing as a counter-application for a review. After hearing the medical evidence on both sides the county court judge dismissed the application to redeem with costs and, holding that no change of circumstances had occurred since the award, dismissed the counter-application, also with costs.

Edgar Dale for the appellant.

Gerald Gardiner for the respondent.

SLESSER, L.J.: This is an appeal from a decision of the county court judge refusing to redeem a figure of compensation which had been paid to an injured workman on the application by the employer under the Workmen's Compensation Act, 1925, s. 13.

The applicant, who was employed by the respondent as an engine driver and labourer, on Sept. 17, 1931, was injured whilst working in the engine house in grinding wheat, and the first and second finger of his right hand were cut off just below the first knuckles. Compensation was paid to the workman and that compensation was paid for some time at the rate of 22s. 10d. a week, but later the workman was employed by the employer for a time for eight months in the year, but ultimately for the period of the full year, which enabled the employer, instead of having to pay him 22s. 10d. a week, to pay him a lesser sum of 14s. 7d. per week. Ultimately an agreement was arrived at between the parties, which is dated Oct. 31, 1933, and that agreement was as follows:

The employer do pay to the applicant, Joseph Harrison Paling, the weekly sum of 14s. 7d. as compensation for personal injury caused to the said Joseph Harrison Paling on Sept. 17, 1931, by accident arising out of and in the course of his employment as a workman employed by the said respondent and further that the respondent employs the applicant in the manner and at the work offered by him in court on Oct. 10, 1933: the said work to be reasonably suitable and to be of the minimum duration of eight months of the year at the minimum wage of 2s. 6d. a day. Should the respondent fail to employ the applicant, unless the said failure is brought about by the neglect, disobedience or slackness and/or other wilful act of the applicant, and should the alleged fainting and/or dizziness become more

chronic to such an extent as to render the applicant unable to do the work provided the respondent agrees that the same shall be deemed to be a "change of circumstances" within the meaning of the Workmen's Compensation Act.

In accordance with that agreement the workman was duly paid his 14s. 7d. a week and he was in fact employed continuously, not merely for the eight months, on the work agreed upon in that agreement.

On Jan. 7, 1936, the employer applied for an arbitration in respect of the redemption of the weekly payments payable to Paling. The application states that the date of the agreement was an award of Oct. 31, 1933, fixing a weekly payment of 14s. 7d. and that it continued. On that, the workman, by way of answer, pleaded that the compensation had been paid by the applicant to the respondent for the said injury from the date of the accident to Mar. 23, 1933, at the rate of 22s. 10d. a week, and he mentions the agreement to which I have referred, which contained the obligation to pay the minimum wage of 2s. 6d. a day and the weekly sum of 14s. 7d. as compensation, and he stated that the full terms were set out in the award. The workman also states that he is unable to use his right hand, and, further, that he desires to bring to the notice of the judge the facts stated in the particulars, namely, that a change of circumstance within the Workmen's Compensation Act had arisen and :

that by reason of the said change of circumstance the respondent intends at the hearing, if necessary, to apply that the compensation payable by the applicant to the respondent be re-assessed accordingly.

He gave further particulars on Feb. 21, 1936, to say that "the change of circumstance" he referred to is : (i) The fact that the injury to the said hand has failed to respond to treatment and that, on the contrary, further contraction has taken place ; (ii) The fact that owing to the said injury the respondent is unable to obtain work other than provided on compassionate grounds by the applicant and has become an odd lot in the market. The matter of the change of circumstance was traversed by the employer.

It will be seen from the nature of the application and the nature of the award that this man in fact was receiving a compensation partly in the form of compensation as such and partly in the manner of receiving special work for which a special provision was made in the agreement. It was in no sense a permanent agreement necessarily, because it provided that at any time if there were variations in the work offered to the workman it might be treated as a change of circumstance that gave the workman a right to review. In those circumstances it is clear, to my mind, that whatever else was the weekly payment to the workman, it was not the sum of 14s. 7d. If authority be needed for that view it is to be found in the case of *Clawley v. Carlton Main Colliery Company* (1). There the workman, while at work in the colliery,

met with an accident which resulted in permanent lameness, and he was paid half wages on the footing of total incapacity. An agreement was come to whereby his employers agreed to find him a house for which he was to pay rent, and provided suitable light employment, at which he could sit down, and also to pay him wages at a rate which would enable him to earn £1 7s. 6d. a week, and 8s. 10d. a week compensation. The workman worked under this agreement till 1916, when the employers applied to the county court judge to redeem their liability on the basis of the weekly payment of 8s. 10d., which was the sum actually paid in compensation, as was the sum of 14s. 7d. in the present case, and the county court judge allowed the redemption. The headnote continues :

The employers appealed against the order for a declaration for liability being coupled with redemption and the workman appealed against the order for redemption.

The Court of Appeal, by a majority, allowed the employer's appeal, BANKES, L.J., dissenting, but in the House of Lords it was held that the employer could not redeem on the basis of the compensation actually paid, that is, the sum of 8s. 10d., but that the workman was entitled to ask for a redemption on the basis of the full compensation under the Act to which the injured workman would be entitled.

In the present case, when the case came on for hearing, there is no doubt at all, in my mind, that the representatives of the employer did ask for redemption on the basis of 14s. 7d. and on no other figure. Mr. Gething, who then appeared for the employer, said the employer is entitled to redeem. In Oct., 1933, the court made an award, and the court award so made was for 14s. 7d. a week, and since then there has been no change of circumstance. The offer is still open, and is confirmed to-day (that is the work agreed upon) and he submitted :

I am entitled to redeem the payments by the appropriate sum.

That, in itself, the appropriate sum, would not perhaps quite conclude the matter as to what it was that Mr. Gething was demanding, but Mr. Gardiner, who appeared for the workman, said this :

The onus is not upon me. I object. There cannot be an application to redeem upon the figure of 14s. 7d. (See *Clawley v. Carlton Main Colliery Co.*, (1)), which, as I have pointed out, was a case, I think not distinguishable in principle from the present one ; the only difference being that there were certain provisions made in kind as well as the wages. On that, I look to see what was the attitude taken up by Mr. Gething. Mr. Gardiner having objected that he could not have an application to redeem made against him on the basis of the figure of 14s. 7d. a week which was not his true compensation, Mr. Gething first of all said this :

There is a difference between this case and *Clawley's* case (1), in that, apart from the weekly payments, there were other definite benefits,

and Mr. Dale has conceded here that there can be no such distinction between this case and *Clawley's* case (1). Mr. Gething goes on to say :

Therefore, the proper compensation payable to him in the present case—which is entirely different from *Clawley's* case (1)—is 14s. 7d. and 14s. 7d. only.

He continues :

In this case there is a definite award of 14s. 7d. That, therefore, is the basic weekly payment. Submitted, therefore, that if I can show that this man has for the last two and a half years been capable of earning 2s. 6d. a day, then I submit I am entitled to redeem on the basis of 14s. 7d.

It seems to me impossible, on that view so presented by Mr. Gething, to come to any conclusion, but that this redemption was sought on the basis of seventy-five per cent. of the annual value of the weekly payment, that is to say, seventy-five per cent. of 14s. 7d., which, I understand, would mean a sum of £395 altogether. On that, the learned county court judge, summarily if you will, but quite clearly, said : “ Application for redemption dismissed,” and if, instead of “ application for redemption ” we read “ application for a limit of 14s. 7d.,” which is the only application recorded, I think he was entitled to come to that conclusion.

Mr. Dale has argued that it remained, even if the judge had come to the conclusion that Mr. Gething's application failed, for the judge himself to ascertain what was the true weekly payment on which, according to *Clawley's* case (1), the redemption ought to be based. I can find no such obligation incumbent upon the learned county court judge at all in the circumstances of this case. There may be other cases where different considerations arise, but in this case the employer, having thought it fit to base his case on a figure on which he was not entitled to redeem and on that figure only, as the argument which I have read shows quite clearly, and the burden of satisfying the section being on the employer, although I agree with Mr. Dale that he has a right of redemption at the proper weekly compensation, there was, in my opinion, no burden upon the county court judge to travel outside that case which the employers had limited.

LORD WRENBURY put the matter very clearly at p. 455 in *Clawley's* case (1), where he says :

If the employer proceeds with the application as it stands—

that is, for the sum which was actually being paid in compensation, the 8s. 10d. which corresponds exactly to the 14s. 7d. here—

and without making any application to review or to fix the statutory compensation, the judge will no doubt deal with it accordingly.

Here there was not only no application to review or fix the statutory compensation, but there was definitely a confining, in the argument of

Mr. Gething, of his case to a claim for redemption at 14s. 7d., and that was a point of view from which he never departed. In those circumstances I think the learned county court judge was right in this case in so dealing with the matter.

There only remains one other question to deal with. It is argued because the workman had himself asked for a review that that in itself, as I understand it, puts some obligation on the learned judge to travel outside the employer's case. I do not so read it. The employer had a case for redemption at 14s. 7d. The workman never applied in terms for a review at all, but he did make a counter-application saying that his medical condition had got worse, and he was unable to obtain work other than that given on compassionate grounds by the applicant. That may, or may not, have been some ground for varying the amount of compensation in the original agreement as it stood ; other difficulties might have arisen whilst the agreement was in existence through there being any change of circumstance, and it might be that this application for redemption would constitute a difficulty. All that seems to me entirely outside the question in this case. This is an appeal by the employer on a refusal by the judge and the action of the workman in asking for a reconsideration of his medical and economic condition seems to me to put no obligation upon the learned judge to redeem at a figure which the employer had never asked for. The employer has failed to ask, within the meaning of the section, for a redemption on the basis of seventy-five per cent. of the weekly payment ; he has asked for redemption on a basis other than the weekly payment, and, as we are told, the weekly payment ought to be read in the light of *Clawley's* case (1) and he has asked for something to which he is not entitled. The learned judge is entitled to refuse to give him that to which the statute gave him no right.

MACKINNON, J. : I agree. The application on the part of the employer in this case to the learned judge was that the county court judge should do that which LORD FINLAY very reasonably characterises as grossly unjust to the workman, and that being so, I think the county court judge was not only justified in refusing, but bound to refuse to accept this proposition and he dismissed the application. This appeal, therefore, fails.

GODDARD, J. : I agree, and only desire to add a few words in deference to the able argument which Mr. Dale has addressed to us, because he seems to suggest that we are overruling or departing from a long line of cases. On the other hand, if we reverse this decision, I think our judgment would not only be open to the comment that it did overrule certain decisions, but refused to follow a plain decision of the House of

Lords. No one denies the right of an employer to redeem and go to the court and say: "I am paying compensation at such and such a rate, redeem at whatever figure may be appropriate"; but that is not what happened in this case at all. In this case the employer is paying compensation in exactly the same way as in the case of *Clawley v. Carlton Main Colliery Company* (1); he is paying partly in cash and partly in kind, namely, by giving employment of a special nature. The House of Lords decided in *Clawley's* case (1) that you cannot redeem an agreement of that nature; where there is an agreement of that nature partly in cash and partly in kind you cannot redeem it. What you must do is first of all go to the county court judge and get the county court judge to fix the actual compensation to which the workman is entitled; that is to say, the cash weekly payment, irrespective of the benefit which the employer is giving by work or, as in *Clawley v. Carlton Main Colliery Company* (1), by a house or something of that sort. When you have done that you may be able to apply for redemption, although it seems doubtful on the opinion of LORD SUMNER and LORD WRENBURY whether you can apply at once for a redemption or whether you must let six months go by. There seems to be a difference of opinion in the House on that point and no decided opinion has been given, and I say nothing more about it.

Where it seems to me the employer was wrong in this case and the county court judge was right, was that the employer went to the court and asked, exactly as in *Clawley's* case (1), to redeem the cash payment without regard to the other part of the agreement, and the county court judge, therefore, in my opinion, acted correctly, because he followed the course which the House of Lords said he should follow when he dismissed the application.

My Lord has read one passage in LORD WRENBURY'S opinion, and I desire to read two or three words further on, because Mr. Dale tried to found an argument on this point. After reading the words my Lord has read he said:

If either employer or workman makes some application such as above a different result may ensue.

The "application such as above" means the sort of application he mentioned at the top of p. 455, where he is pointing out that the Court of Appeal indicated:

That it was open to the workman (not the employer) to apply to review under para. (16), remitted the matter to the county court judge who determined whether the capacity of the workman was "permanent" and "to make an order accordingly final and complete."

The noble Lord goes on to say that either the employer or the workman can make that application; that is, an application to review. In this

case it seems to me that the workman made no sort of application to review. It is true he challenged in his answer that his compensation was only 14s. 7d. a week, and it is true, as my Lord has pointed out, that he said his medical condition had changed. If his answer means anything to my mind it means: "I ought to receive more than 14s. 7d. a week now because I cannot go on earning 2s. 6d. a day, or may not be able to go on earning 2s. 6d. a day, which I am getting under this agreement which you have made," but it is in no sense an application by the workman to review, and he probably at that time was more or less content to go on with the work he was doing and the compensation he was receiving. Therefore, in my view, where the employer is wrong, and, I think, quite wrong, is that he did not apply to the county court judge in the first instance to get the statutory compensation in cash fixed, because that seems, according to the judgment in *Clawley's* case (1), a condition precedent to the application to redeem when the agreement is one such as we have in this case. I agree, therefore, the appeal should be dismissed.

Solicitors: *Field, Foscoe & Co.*, agents for *Sadler & Lemmon*, King's Lynn (for the appellant); *Metcalfe, Copeman & Pettefar* (for the respondent).

[Reported by FRANK ROWE, ESQ., Barrister-at-Law.]

HORN v. MINISTER OF HEALTH.

[KING'S BENCH DIVISION (Swift, J.), July 8, 9, 1936.]

[COURT OF APPEAL (Greer, Slessor and Scott, L.JJ.), July 23, 24, 1936.]

Public Health—Housing—Compulsory purchase order—Confirmation—Deputation from local authority to Minister—Absence of other party.

A local authority made a compulsory purchase order under the Housing Act, 1925, s. 64, in respect of certain land required for housing. A public local inquiry was held. Shortly afterwards and before the confirmation of the order a deputation from the local authority visited the Minister of Health to discuss generally the provision of houses in their district under the Housing Act, 1935. The visit had been arranged before the public local inquiry and had no reference to the subject-matter of the inquiry. On an application to quash the compulsory purchase order, SWIFT, J., held that the Minister, while acting in a *quasi-judicial* capacity ought not to have had an interview with one party without hearing the other party, and he quashed the order. The Minister of Health appealed:—

Held: inasmuch as the matters discussed at the interview had no relation to the compulsory purchase order, no wrong was done by the interview, in which the Minister was acting in a purely administrative capacity. There was no ground for quashing the order.

[EDITORIAL NOTE.] This case is distinguishable from *Errington's* case (1) in that the meeting or discussion subsequent to the inquiry, but before the actual confirmation of the order, was not concerned with the compulsory purchase of the land comprised in the order. In the lower court it was assumed that it was an occasion upon which reference might inadvertently have been made to it and that the proprietor or his representatives should have been there, but the Court of Appeal accepted the evidence of members of the deputation that the matter was not referred to. Further, the Minister was not then acting in a *quasi-judicial* capacity, but in an administrative one, and it would become impossible for him in practice to carry out all his duties if a proper distinction were not drawn between *quasi-judicial* and administrative functions.

AS TO INQUIRIES UNDER THE HOUSING ACTS, see HALSBURY, Supp., Public Health, paras. 1034-1042, and FOR CASES, see DIGEST SUPP., Public Health, cases 502l-506d.]

Cases referred to:

- (1) *Errington v. Minister of Health*, [1935] 1 K.B. 249; Digest Supp.
- (2) *Offer v. Minister of Health*, [1936] 1 K.B. 40; Digest Supp.
- (3) *Frost v. Minister of Health*, [1935] 1 K.B. 286; Digest Supp.
- (4) *Re Manchester (Ringway Airport) Compulsory Purchase Order* (1935), 153 L.T. 219; Digest Supp.
- (5) *R. v. Sussex JJ., Ex p. McCarthy*, [1924] 1 K.B. 256; 33 Digest 294, 97.
- (6) *R. v. Essex JJ., Ex p. Perkins*, [1927] 2 K.B. 475; Digest Supp.
- (7) *Hill v. Tothill*, [1936] W.N. 126; Digest Supp.
- (8) *Harvey v. Shelton* (1844), 7 Beav. 455; 2 Digest 447, 952.

APPLICATION by Mr. Allen Horn that a compulsory purchase order made by the Sunderland Corporation and confirmed by the Minister of Health should be quashed. On Aug. 14, 1935, the corporation made a compulsory purchase order under the Housing Act, 1925, s. 64, by which

they proposed to acquire 102 acres of land in Durham Road, Sunderland, the property of the applicant. On Oct. 11, 1935, Mr. Allen Horn lodged an objection with the Minister. On Dec. 5, 1935, the Minister caused a local inquiry to be held. On Dec. 12, 1935, a deputation from the corporation went to the Ministry. Notice of the Minister's intention to confirm the order was given to the corporation on Dec. 21, 1935. The order was confirmed on Jan. 11, 1936.

H. A. Hill and *D. P. Kerrigan*, for the applicants: The Minister, in considering the confirmation of the order, failed to act judicially and, as a result, the interests of the applicants have been substantially prejudiced. The applicant objected to the local authority acquiring his land and the Minister ordered a local inquiry to be held. This took place on Dec. 5, 1935. On Dec. 12, 1935, a deputation from the local authority visited the Ministry to discuss housing conditions in Sunderland and this is the matter of which complaint is made. There was no ulterior motive and no desire to prejudice the applicant, but it was unfortunate. It was bound to have an influence although that was not intended. Finance was at the back of this deputation rather than any intention of influencing the Minister, but it is enough, for the applicant's case, that the deputation went to the Minister and discussed the housing problem of Sunderland, which was the essence of the case for getting this order confirmed. [Counsel referred to *Errington v. Minister of Health* (1); *Offer v. Minister of Health* (2)].

The Solicitor-General (*Sir Terence O'Connor, K.C.*), and *Valentine Holmes*, for the Minister of Health: The argument for the applicant depends upon whether there has been a matter which brings the Minister's quasi-judicial functions into play, and that being so, there must be no contact between the Minister and one of the parties on any matter whatever. But the Minister could not discharge his administrative duties under the Housing Acts unless he had continuous contact with the local authorities. It cannot be suggested that the whole of the administrative relations with local authorities have to be interfered with because, in some judicial capacity, the Minister is considering some compulsory acquisition order, although it may be relative to a matter of quite small dimensions. The administration could not be carried on if some small order is to hold up communication between the local authority and the Minister of Health. In a matter where a judicial function is cast upon a public officer, there must be fair play. The Town Clerk of Sunderland and Mr. Howes were in court for cross-examination, but they were not called by Mr. Hill. The deputation to the Ministry was arranged weeks beforehand and it was arranged on an agenda prepared beforehand. The deputation only overlapped the inquiry by chance. Therefore the order should not be quashed. [Counsel referred to *Errington v. Minister of Health* (1), *Frost v. Minister of Health* (3), *Re Manchester (Ringway*

Airport) Compulsory Purchase Order (4), *R. v. Sussex JJ.* (5), *R. v. Essex JJ.* (6), *Hill v. Tothill* (7)].

Hill in reply : The criminal cases which have been referred to are not in *pari materia* with this case. They were never referred to by counsel in *Errington's* case (1). This case is extremely important. Our whole social structure depends upon the preservation of rights of property and as big a question of principle is raised in this case as in a penal matter. [He referred to *Harvey v. Shelton* (8), *Hill v. Tothill* (7)].

SWIFT, J. : By the Housing Act, 1925, s. 64, power to acquire land compulsorily is conferred upon local authorities. That section provides that a local authority may be authorised to purchase land compulsorily for the purpose of part III of the Act by means of an order submitted to the Minister and confirmed by him in accordance with sched. III of the Act. That section has been amended, but the substance of it remains. Under that section the Sunderland Corporation made an order by which they proposed to acquire compulsorily land in Durham Road, belonging to Mr. Allen Horn, consisting of some 102 acres. Part of that land they desired for the purpose of building houses and part of it they desired for the purpose of enlarging a public park. There was a point originally raised in the notice of appeal to the effect that under this procedure, there was no power in the corporation to acquire land for the purpose of a public park. That point has been abandoned, and abandoned in this case for all time. Some day it may have to be decided. It does not fall to be decided either to-day, or any day in regard of this particular land and this particular corporation and this particular park.

This corporation, having desired to purchase Mr. Allen Horn's land for the purpose of housing, gave the required notice to Mr. Horn. On Oct. 11, 1935, Mr. Horn objected to their taking his land. Upon that, the Minister, as under the Act of Parliament he was bound to do, ordered a local inquiry to take place. The first thing that I have to determine is : What was the position of the Minister from the moment that objection was taken by Mr. Allen Horn ? Was he merely an administrator of the Housing Acts, or was he a *quasi-judicial* officer charged with judicial duties, having to decide some contest between two litigating or differing parties, the one saying : " We are entitled to take this land at a fair price," and the other saying : " No, it is my land and I want it, and you shall not have it " ? The Minister had to arbitrate or to decide between the two of them as to which was right and which was wrong, whether in the public interest the corporation should have it to the sacrifice of Mr. Horn's private interests, or whether the public interest was not so great that Mr. Allen Horn's private interests should be sacrificed in that way. Having that duty to perform, the Minister appointed the inspector to hold a public inquiry at which the matter was gone into and

the contentions of both parties could be heard. That inquiry was held on Dec. 5, 1935. As to the conduct of that inquiry, there is no criticism of it by either party. It is admitted that it was conducted with strict propriety by the gentleman whom the Minister had appointed to hold it. He held the inquiry on Dec. 5, 1935, and it was a necessary part of the case which was made before him for the corporation that he should have submitted to him, not only particulars about this piece of land of 102 acres of Mr. Horn, but that he should have submitted to him all the facts and the figures and statistics as to the population of Sunderland, and that he should have a general idea given to him as to the necessity for the provision of houses by the corporation for the relieving of overcrowding, or for the purposes of remedying lack of accommodation caused by demolition areas. The whole of the housing situation in Sunderland was more or less discussed at that public inquiry on Dec. 5. Upon that, it was the duty of the inspector to make a report to the Minister and I have no doubt he in due course did so. The complaint which is made here is, that after that public inquiry was ended, and while the Minister was still acting as a judicial person who had to decide between these two parties what should be done in this matter, he received, through one of his agents, a deputation from the corporation, which came for the express purpose of discussing with him housing in Sunderland. It is said, in fact, that this particular piece of land was not discussed at all. On the other hand, it is said: "Well, I cannot say that it was discussed, because I was not there. That is my complaint. There was some discussion about housing. What the discussion about housing was I do not know, because I was not there to take part in it. I do know now there was a discussion about the provision of 800 houses and this piece of land of mine was the only piece of land they had got upon which they could put 800 houses, and directly after they had powers to do it, they passed a resolution to put 800 houses on to this piece of land. Therefore," says the applicant, "although I cannot say what really did happen before the Minister because I was not there, I have a very shrewd suspicion that it was a talk about houses which it was intended that the corporation should erect upon my land, even if that was not brought directly to the attention of the Minister."

Now it was said, on behalf of the applicant, that it was wrong for the Minister to receive a deputation from the corporation in the circumstances then existing, that the public inquiry had just been concluded and that until the order was confirmed, he was acting in a *quasi*-judicial position. He had to discharge his functions judicially, and the highest judicial function to be found laid down in all the cases dealing with these matters is, so far as I know, that you shall not hear one party behind the back of another. Nothing is to be said to the person who has to decide a matter between the parties, by one of them, which the other has not full

opportunity of answering. It is said here by Mr. Horn: "After the public inquiry and before the Minister confirmed this order, he received a deputation from the corporation which discussed with him housing in Sunderland and that is enough to make this confirmation of the order invalid, although I cannot prove that they actually spoke about this particular piece of land which was being bought from me." I have to decide whether that contention is well founded or not, and, in my view, it is. Whatever may be the inconvenience of it, and whatever may be the desirability of some other system, it seems to me that since the decision in *Errington's* case (1), there is no getting away from the fact that the Minister is a *quasi*-judicial authority and that he must act in a judicial manner, and he must not receive, however inconvenient it may be that he should not, people from one side without hearing the other side, and giving an opportunity to the other side to say what they want to about the allegations that are made.

I do not think it is necessary in this case to apply the principles which are laid down in the magistrates' cases to which my attention was very courteously called by the Solicitor-General, when I asked him if he would be good enough to help me by finding those which I had somewhere at the back of my mind. I do not think it necessary to refer to them, because, quite apart from those cases, I think this case is covered by *Errington's* case (1). I cannot distinguish between the Minister, going by his agent to the town, as was done when the town was Jarrow, or the town, by its agents, going to the Minister, as was done when Sunderland went, by a deputation, to see the Minister over this matter.

I cannot distinguish between the two, and *Errington's* case (1) seems to me to govern it, but if anything more were required, I should say that certainly in this case justice would not seem to be done. Having participated in the local inquiry which had been held on Dec. 5 to determine whether or not the corporation should acquire 102 acres of his land, any reasonable man might, I think, properly come to the conclusion, when he heard a day or two afterwards or a week afterwards that the deputation from the corporation had been up to London to see the Minister of Health, who had got to decide the matter, that they had gone to see him about these matters, as, indeed, on the statement, as it is now before me they did, in the sense that they went there for the purpose of generally discussing housing, of which this was a small portion and I think probably discussing this among other things, but at any rate, discussing the 800 houses which it proposed should be put upon this land. I think, therefore, that in arriving at a decision to confirm this order, the Minister received evidence and statements which he should not have done in the sense that they were not communicated to the other side and the other side had no opportunity of answering them. Therefore, I think the confirmation is bad. In saying that, I must not

for one moment be thought to be saying that I think Mr. Howes acted in any way in bad faith. I do not think he did and I do not think that the corporation acted in bad faith any more than I think that Mr. Horn, when he wrote to the Minister, acted in bad faith. It is one of the difficulties caused by this system of administration under these acts where a minister is partly an administrator and partly a judge, that people do not quite know what he is. He varies from time to time and people go to him when they should not, and he hears them when he should not. I do not think that either the Sunderland Corporation, or Mr. Howes, or Mr. Horn had the least bad faith in this matter, but I do think it was irregular and I think it was an irregularity of which Mr. Horn is entitled to complain. It is an irregularity going so much to the root of the matter that in my view it makes the confirmation bad and I therefore direct that this order be quashed.

The Minister of Health appealed.

The Solicitor-General (Sir Terence O'Connor, K.C.) and Valentine Holmes, for the appellant.

R. M. Montgomery, K.C., and H. A. Hill, for the respondent.

The arguments upon the appeal were substantially the same as in the court below and the same authorities were relied upon.

GREER, L.J. : This is an appeal from the order of SWIFT, J., quashing an order for compulsory purchase which was made by the Minister of Health under the provisions of certain statutes, beginning with 1925 and concluding with 1930 and 1935. The order which was made by the local council and which is the beginning of the matter which has to be discussed was an order which is said to be made under the Housing Acts, 1925 to 1935, and the council passed this resolution :

Subject to the provisions of this order, the council of the county borough of Sunderland are hereby authorised to purchase compulsorily for the purposes of the Housing Act, 1925, part III, the lands described in the schedule hereto which lands are shown coloured pink on a map marked "Sunderland (Durham Road) Housing Order, 1935" and sealed with the common seal of the council.

Therefore it is apparent from that order, which is made in the first instance by the council subject to confirmation, that they were desirous of being authorised to purchase compulsorily for the purposes of the Housing Act, 1925, part III, the land which is known as Springwell Farm, the boundaries of which are particularly described in the schedule to the order. That order, like other orders of that kind, does not operate until it has been confirmed by the Minister. It has to be published and if the owner, whose land it is proposed to take compulsorily, objects to having his land taken compulsorily, he is entitled to go before an inspector, appointed by the Ministry for the purpose of holding a local inquiry,

and to urge his objections. He did urge his objections, the main objection being that the council had plenty of land of their own, and really it did not require to take his farm for the purposes of carrying out the order which they had made. That matter was considered, and I have no doubt fully and rightly considered, by the inspector, and he made a report, the contents of which we do not know and cannot have any opportunity of ascertaining, to the Ministry of Health. Now, the council, having before the inquiry asked for an appointment before the Minister, in order that the Minister might deal with their wants generally and their general requirements in his administrative capacity, did not and could not get an appointment until after the hearing of the public local inquiry. They got an appointment at a later date after the inquiry, and they thereupon sent their town clerk and other representatives to interview the Minister. I have no doubt whatever that if at that meeting representations had been made to the Minister of Health behind the back of the objector, in order to persuade him to confirm the order made by the council, then there would have been ample jurisdiction in the court to say that it is not only contrary to justice, but it is contrary to that which is implied in the powers given to the Minister under the statutes. But nothing of the kind happened, as I understand the evidence which was before the learned judge. Mr. McIntire, the town clerk, made an affidavit, and in that affidavit he says :

I visited the Ministry of Health and had an interview with Mr. W. H. Howes of the Ministry and a discussion took place with regard to the action proposed to be taken by my council in order to carry out their obligations under the Housing Act, 1935.

They had, in order to carry out those obligations, to make certain provisions by certain dates which are provided for in the statute. Then he goes on to say :

On Dec. 14, 1935, I made a written note of what happened at the interview with Mr. Howes, and a copy of that note is now shown to me and marked "G.S.M." It will be observed that in the note no reference is made to the Sunderland (Durham Road) Housing Order, 1935, and I definitely say that the Sunderland (Durham Road) Housing Order, 1935, was not considered at the interview.

I need not read the note which is marked "G.S.M." because it absolutely confirms the statement contained in the affidavit. Then there were two other affidavits which have got to be considered. Mr. Howes of the Ministry of Health also made an affidavit to this effect, referring to the affidavit of Mr. Horn in para. 9 :

I received a deputation from the Sunderland Corporation on Dec. 12, 1935. To the best of my recollection and belief no reference was made to the order, the subject of this appeal, and the deputation were not concerned with the order in question. What took place was as follows. The clerk to the corporation said that the medical officer of health estimated it would be necessary to rehouse over

7,000 families under the Housing Act, 1935, and that the council intended to ask the Minister to consent to the erection of 800 houses on a site belonging to them at Hylton Lane, but that this was largely dependent on the payment of a subsidy under the Housing Act, 1935, s. 32, in order to enable the houses to be let at sufficiently low rents. I said that the Minister would offer no objection and that the application for a subsidy would not be prejudiced by reason of the fact that the building of the houses might be commenced before a decision on the application had been given.

Now, two things are apparent there : first, that the interview was not concerned with the provision of houses under the 1930 Act at all, but was only concerned with the provision of houses under the 1935 Act ; secondly it was obviously part of the duty of the Minister and part of the duty of the council to consult together in order to see what ought to be done in relation to the Act of 1935, and obviously to the interest of the council to urge upon the Ministry that they should be allowed the largest sum that it was competent for the Ministry of Health to allow them in respect of the houses that they had to build under the statute of 1935. Under those circumstances, I cannot for myself see that anything wrong was done, either by the council or by the Minister, in considering the questions which were put before him at the interview which took place after the public inquiry but before the publication of the Minister's decision in relation to the objections which had been put forward at the public inquiry.

Dealing with the cases which have been cited, it seems to me that neither of the two cases referred to has any relation to the facts of the present case. In *Errington's* case (1) it is quite clear that what took place after the inquiry but before the confirmation order was that arguments and facts were put before the Minister by the council in order to persuade him to make the order, which was the subject-matter of the local inquiry. In those circumstances, it was clear that the provisions of natural justice that you should hear both sides, which applies to all questions where the function of the Minister is a *quasi-judicial* function, had not been complied with, and therefore the order was rightly ordered to be quashed. In the other case, *Offer v. Minister of Health* (2), which is a more recent case, the interviews all took place before the public inquiry and before any objections had been lodged and, of course, it could not properly be urged against the Minister with any chance of success that he was, at the time of the interviews, engaged in a *quasi-judicial* function.

Something has been said, and quite properly said, by Mr. Montgomery, about the decision of *BRANSON, J.*, which has been cited in the case of *Re Manchester (Ringway Airport) Compulsory Purchase Order* (4). All I desire to say about that case is this, that it does not raise the same question as is raised in the present case, and I reserve my right to say, if the question should directly arise, whether I agree or disagree with

his decision. It must not be supposed that anything we say in this case has anything to do, either by way of approval or disapproval, with the decision of BRANSON, J., in that case.

I think the appeal must be allowed and allowed with the usual consequences.

SLESSER, L.J. : I am of the same opinion. In this case it appears when the evidence is considered that the difficulty has arisen by reason of the fact that the Minister performed two different functions under two different Acts of Parliament. In the first place, it was his duty to consider and confirm, with or without modification if he thought fit so to do, the order which the local authority proposed to make upon Mr. Horn to acquire his land compulsorily under the Housing Act, 1925, s. 64. I agree entirely with what my Lord has said, and with what I think indeed has been already decided in this court in the case of *Errington v. Minister of Health* (1), that if in deciding whether or not he should confirm that clearance order, the Minister were to hold any kind of private inquiry to which one of the parties was not invited, or to take into consideration *ex parte* statements which the owners had no opportunity of dealing with, he would not have been acting in accordance with the correct principle of justice. But when the facts of this case are considered and the acts of the Minister are taken into consideration, I think it is impossible to bring this case within the principles or the facts considered in *Errington's* case (1).

Now, first of all, we have to have regard to the affidavits to which my Lord has made reference which seem to me (and they are indeed the only evidence on which we have to rely) to show quite clearly that on the only occasion when the owner says that the mind of the Minister might have been influenced, the matters which were discussed by the Minister through his representative and the local authority were matters quite other than the compulsory purchase of this land. As my Lord has pointed out, Mr. McIntire, the town clerk, says that at the interview no reference was made to the Sunderland (Durham Road) Housing Order, and he says :

I definitely say that the question of the Sunderland (Durham Road) Housing Order, 1935, was not considered at the interview.

He calls attention to the fact that in the notes of what happened there is no such reference, and Mr. Howes of the Ministry of Health, as I read his affidavit, speaks to the same effect. He says :

To the best of my recollection and belief no reference was made to the order, the subject of this appeal, and the deputation were not concerned with the order in question.

True it is he goes on to give an account on which Mr. Montgomery founded his argument. He says :

What took place was as follows. The clerk to the corporation said that the medical officer of health estimated it would be necessary to rehouse over 7,000 families under the Housing Act, 1935, and that the council intended to ask the Minister to consent to the erection of 800 houses on a site belonging to them at Hylton Lane.

Mr. Montgomery argues that that reference to Hylton Lane should be taken to be a reference to the respondent's land. Now I see no reason for making that assumption. This gentleman states that no reference was made to the order, and he is speaking specifically of the erection of houses on a site belonging to them, meaning the council. The council did not own the farm, but Mr. Horn owned the farm, the subject-matter of this present appeal. There may or may not have been some mis-recollection, but there is no possible evidence at all to the effect that this order of the council was ever discussed, but there is much evidence to the contrary. I am unable, no evidence having been called at the trial, to draw any conclusions other than those of the facts which are stated in these affidavits. With regard to the subject matter on which the council did go to see the Ministry, I think it is clear what happened. The Act of 1935 by sect. 1 put upon the council a duty to inspect and make reports and proposals as to overcrowding. Those duties had to be performed at certain specified dates, and by a circular of Nov. 19, 1935, the Minister stated that he had decided to fix for the completion of inspection Apr. 1, 1936, for the submission of the report June 1, 1936, and for the submission of proposals Aug. 1, 1936. Now all that was done, in my opinion, in relation to this interview which is complained of here, was done in relation to that circular, and to the duties of the local authority under the Act of 1935. On Nov. 30, 1935, with commendable speed after receiving the circular, the town clerk writes to the Ministry saying :

I am directed by the health committee for this borough to inform the Minister that they have appointed a deputation . . . with respect to the following matters.

There are three matters, but only one has relation to anything we have here to consider, and that is : “ (i) Expedition of the provision of new houses under the Housing Act, 1935.” It is clear, therefore, that they sought an interview with the Minister for the purpose of dealing with the inspections and the reports and the other duties which were placed upon them for the first time under the Act of 1935. When the subsequent proceedings are considered that becomes quite clear. On Dec. 6, 1935, the town clerk gives notice that a meeting of the council will be held, to pass resolutions regarding the report of the health

committee, of which again I think only one matter has reference to the interview with the Minister, and that is :

For completing an inspection of the working-class houses in the district of the local authority to ascertain the overcrowded houses.

Then follows a reference to Apr. 1, 1936, which was the date which the Minister had fixed for the completion of the inspection. Then it goes on :

For preparing and submitting to the Minister proposals for the provision of the new houses required for this purpose, Aug. 1, 1936, and they recommend that their action in appointing a deputation comprising the mayor, the chairman of the committee and the appropriate officers to wait upon the Minister of Health with a view to expediting the provision of new houses under the Act be confirmed.

That is ample corroboration, I think, of the fact that their sole purpose in going to the Ministry was to carry out their powers and duties under the Act of 1935, sect. 1. True it is that there also appears in that notice of the meeting of the council a recommendation that the land known as Springwell Farm, that is the respondent's land :

an order for the compulsory acquisition of which for the housing purposes was approved by the council on Aug. 14 last be allocated for the purpose of rehousing under the Act.

In strictness, of course, they could not allocate it until they had got the confirmation of the Minister, which was not then forthcoming, but I do not read that recommendation, which is followed by another recommendation dealing with an entirely different matter, as anything to do whatever with the purpose of their interview with the Minister. In these circumstances the case seems to me to resolve itself into this, that short of some discussion or reference before the Minister to the matter with which he was concerned under the Act of 1925 in which he was confirming a compulsory order, a general discussion in relation to the matters raised under the overcrowding sections of the Act of 1935 had nothing whatever to do with the taking of the respondent's land. Although, as my Lord has said, the case of *Offer v. Minister of Health* (2) is strictly distinguishable from this case by reason of the fact that there the inquiry was made before there was any issue or *lis* between the parties at all, yet in the course of that case I, at any rate, expressed the view that whether the inquiry there had taken place either before the issue was joined between the parties or not, unless the case fell within the ambit of *Errington's* case (1), and if what was done at the inquiry was for quite a different purpose, or fell under a different power, the Minister had the right to do it. In that case [*Offer's* case (2)] I pointed out that under the Housing Act, 1925, s. 117, the Minister had specific powers, and I said, at p. 51 :

If the Minister has that right to give that advice, and also has the duty imposed upon him under the Housing Act, 1930, s. 2, of confirming orders, it follows that

he must or may carry out both these powers, and they cannot be said to be contrary to one another when the legislature has in fact given him the authority both to do the one and to do the other—namely, first, give the advice, and secondly, consider *quasi-judicially* the confirmation of the order.

ROCHE, L.J., in giving judgment, says that he agrees that the appeal should be dismissed, “for the reasons given by the Lords Justices who have given judgment,” that is to say, he agrees not only with what my Lord had said with regard to the inquiry not affecting the adjudication because it had occurred before the adjudication, but I myself take it that he is also agreeing with the reasons which I had stated, since he says he agrees with both of us. Therefore, once it is shown that this is a case where it cannot be certain that there is any direct influence or interference with the *quasi-judicial* powers of the Minister in considering the order, then it seems to me that the case does not fall directly within *Offer’s* case (2), but within the observations which I, at any rate, made in *Offer’s* case (2), observations which I understand ROCHE, L.J., to agree with. That being so, I think the Minister here was fully entitled, indeed, if I may say so, it was his duty under the 1935 Act by discussion and consultation to consider with the local authority the state of their overcrowding, and the mere fact that in the area which he had to consider in relation to overcrowding there happened to be, among other lands, the land of this particular gentleman, does not justify the respondent here in saying that because the consideration of overcrowding in Sunderland generally may or may not have had some reaction on his rights as owner of a particular piece of land, that, therefore, the Minister and the local authority in carrying out their duties were doing anything which might influence the Minister so that it could be said he was not acting judicially in dealing with the subject matter of the confirmation.

I would only add this finally, that it is material to observe that Mr. Wrigley, who swears an affidavit on behalf of the Ministry of Health dealing with the subject, not of the inquiry under the Act of 1935, but of the confirmation, says :

Before a decision was arrived at to confirm the order, the subject matter of this appeal, the report of Mr. W. J. Brown as to the evidence given at the inquiry and as to his personal inspection of the properties included in the order, together with the representations made by the applicant, were duly considered. As a result of such consideration it was decided to confirm the order.

Mr. Wrigley is the director of housing, slum clearance and town planning in the department of the Ministry of Health, and I read that affidavit to mean that when a decision was made about confirmation no matters were considered other than those which are stated in his affidavit, namely, the report of the gentleman who held the inquiry and the representations made by the applicant. That affidavit also is strong

reason for coming to the conclusion that *Errington's* case (1) and the principles there laid down have no application to the present case.

I agree that this appeal succeeds.

SCOTT, L.J. : I agree with my two brethren that this appeal should be allowed, and I agree with the reasons upon which they have expressed their judgments. SWIFT, J., as it seems to me, misapplied the decision in *Errington's* case (1), because he thought that the Minister here in effect heard the other side on the subject matter of the inquiry which was still *sub judice*. He quotes the principle that you shall not hear one party behind the back of the other, and then he goes on :

It is said here by Mr. Horn : " After the public inquiry and before the Minister confirmed this order, he received a deputation from the corporation which discussed with him housing in Sunderland and that is enough to make this confirmation of the order invalid, although I cannot prove that they actually spoke about this particular piece of land which was being bought from me." I have to decide whether that contention is well founded or not, and, in my view, it is. Whatever may be the inconvenience of it, and whatever may be the desirability of some other system, it seems to me that since the decision in *Errington's* case (1) there is no getting away from the fact that the Minister is a *quasi-judicial* authority and that he must act in a judicial manner, and he must not receive, however inconvenient it may be, that he should not, people from one side without hearing the other side, and giving an opportunity to the other side to say what they want to about the allegations that are made.

It is impossible, as it seems to me, to read that passage without concluding that the learned judge was acting upon the basis of fact, that the subject-matter of the deputation was necessarily identical with the subject-matter of the inquiry and, therefore, of the dispute between Mr. Horn and the corporation, which the Minister had to adjudicate upon under his judicial functions. It was for that reason that the learned judge, as it seems to me, felt bound by the decision in *Errington's* case (1). I think that that was an erroneous view of the facts of this case. In my opinion, there was no such identity as he assumed. It is common ground between the parties in this court, and I think it was really common ground in the court below, that nothing whatever was said at the deputation which revealed any consideration at all of the particular subject matter of the inquiry which had taken place and upon which the Minister's order of confirmation of purchase depended. Consequently, there could be no objection to the Minister carrying out his administrative duty of consulting with the corporation in regard to matters under the Act of 1935 in relation to overcrowding, unless the subject matter of that deputation and that discussion was, as I put it in a question in the course of the argument, one where there was an inevitable relevance of the subject matter of the deputation to the subject-matter of the purchase order and the inquiry. On consideration here I have come to the conclusion that there was no such

identity. The subject matter of the deputation was the general question as to what financial assistance they could get from the Minister under sect. 32 of the Act of 1935, and the question of time as to whether they could get on with their work without waiting for the further steps being taken upon which it depended. In my view, those facts do not constitute any identity of subject-matter between the two competing subjects of discussion. The Minister was under a statutory duty to carry out his functions under sect. 1 of the Act of 1935, which were elaborated by him in his circular of Nov. 19, 1935, and those were duties which rested on him, as well as on the local authorities, of getting the new programme of relief of overcrowding through rapidly. To have postponed any action that was necessary for the purpose of the overcrowding programme would have been contrary to his administrative duty, unless there was some ground which compelled him to postpone it.

With regard to the argument of the learned Solicitor-General and Mr. Valentine Holmes, under this type of Act where public departments are given *quasi*-judicial duties as well as administrative duties, the need of their carrying out their *quasi*-judicial duties in strict accordance with natural justice must always be considered in the light of their administrative duties also. The administrative duties have to be carried out as part of the policy of Parliament imposed upon the Minister by the statute which he is administering, and Parliament must be taken quite deliberately to have decided that the exercise of the *quasi*-judicial functions of the Minister is compatible with the performance of his administrative duties under the Act. In my view, this particular case illustrates very clearly that principle, that the two types of duties go together and are compatible one with the other. In this particular case, *ex hypothesi* the Minister had the administrative duty of seeing the deputation to discuss the general position under the Act of 1935. To have postponed it would have been contrary to the policy of Parliament in that respect. Unless, therefore, it was a clear case of the discussion of the question upon which that consultation was being held prejudicing the fairness of his decision under the other duty which he was also performing, I am quite clearly of opinion that he was free to carry out his administrative duties. That, really, is the whole question in this case, and I agree with what my learned brethren have said as to the facts, and I do not want to add anything to what they have said upon them. I agree that this appeal should be allowed.

Appeal allowed. Leave to appeal to the House of Lords refused.

Solicitors: *Solicitor to the Ministry of Health* (for the Minister of Health); *Maples, Teesdale & Co.*, agents for *Steel, Maitland & Byers*, Sunderland (for Mr. Horn).

GRENFELL v. E. B. MEYROWITZ, LTD.

[COURT OF APPEAL (Greer, Slessor and Scott, L.J.J.), June 30, July 1, 24, 1936.]

Sale of Goods—"Safety-glass"—Laminated glass—Whether warranty of absolute safety—Merchantable quality—*Sale of Goods Act, 1893 (c. 71), ss. 13, 14 (2).*

An aviator in 1932 purchased from certain opticians flying goggles described in a catalogue as fitted with "safety-glass lenses." The goggles were made of laminated glass consisting of two sheets of glass and an interposed sheet of plastic, and evidence showed that the term "safety-glass" in 1932 referred only to such laminated glass. In the opticians' catalogue notice was given that the purchaser of any goggles of the type here in question was given free insurance to cover £1,000 in the case of loss of sight or expenses incurred in the event of a lesser injury to an eye caused by splintering. In 1935 the aviator was involved in a flying accident in which, *inter alia*, he suffered injury due to a splinter from the goggles entering his eye. The aviator brought an action for breach of contract against the opticians, alleging that the goggles did not correspond with the description "safety-glass," and alternatively that if they did so correspond that they were not of merchantable quality:—

HELD: (i) there was no warranty of absolute safety in the word "safety-glass."

(ii) the plaintiff did obtain what he purported to buy, namely, "safety-glass" goggles as generally understood by persons making or using them, i.e., goggles made from laminated glass.

(iii) there was no evidence that the goggles were not of merchantable quality.

[EDITORIAL NOTE.] The contest here is whether the term "safety-glass" in 1932 still bore its popular meaning or had at that time become a trade term for laminated glass. This question is here largely decided with reference to the evidence in this particular case, but it seems safe to regard this case as an authority for the proposition that "safety-glass" is now a trade term for glass that is safer than ordinary glass but does not imply a warranty of absolute safety. Improvements in manufacture and new discoveries may hereafter result in "safety-glass," as a trade term, ceasing to refer solely to laminated glass, and to that extent the decision here may have to be modified.

AS TO SALES BY DESCRIPTION, see HALSBURY, 1st Edn., Vol. 25, *Sale of Goods*, pp. 154-156, para. 283; and FOR CASES, see DIGEST, Vol. 39, pp. 432-438, Nos. 616-675.]

Cases referred to:

(1) *Wieler v. Schilizzi* (1856), 17 C.B. 619; 39 Digest 434, 629.

(2) *Bristol Tramways, etc., Carriage Co., Ltd. v. Fiat Motors, Ltd.*, [1910] 2 K.B. 831; 39 Digest 418, 512.

APPEAL by the defendants from the judgment of FINLAY, J., and a special jury, in which the plaintiff was awarded the sum of £500 damages for injuries sustained to one of his eyes by reason of a cut by a piece of glass from a pair of goggles fitted with Luxor safety-glass lenses worn by the plaintiff, and purchased from the defendants in Sept., 1932.

On Feb. 15, 1935, the plaintiff was flying over the Solent in a Blackburn "Shark" 3-seater aeroplane, when his engine stopped and he made a forced landing on the water. The plaintiff was at the time wearing the Luxor safety-glass goggles. He was rescued and taken to hospital, and on Apr. 15, 1935, an operation was performed on his eye, and a splinter of glass from one of the lenses of the goggles was extracted therefrom. The following were the grounds of the appeal:

- (i) The verdict was against the weight of evidence and perverse.
- (ii) There was no evidence in support of the plaintiff's claim proper to be left to the jury and the learned judge was wrong in not withdrawing the case from the jury and directing judgment to be entered for the defendants.

(iii) The learned judge misdirected the jury.

(iv) Certain evidence had been improperly admitted.

The jury were asked the following questions and gave the answers annexed to them:

(1) Was this pair of goggles equipped with safety-glass? — No.

(2) Were the goggles of merchantable quality? — No.

(3) Damages (if any)? — £500.

Gilbert Beyfus, K.C., and *E. Ryder Richardson* for the appellants.

D. Rowland Thomas, K.C., and *D. E. Evans* for the respondent.

Beyfus, K.C.: There was no evidence before the jury that safety-glass meant in 1932 glass which would not in any event break or splinter. The evidence on this point before the jury was that safety-glass in 1932 had acquired a technical or trade meaning which was known to the plaintiff himself and which conveyed the fact that the glass consisted of two sheets of glass with some adhesive interlayer. The judge wrongfully admitted evidence of the quality of another pair of goggles manufactured in 1935.

Rowland Thomas, K.C.: This is an action for damages for breach of two implied terms of a contract of sale. The first term was that the goods would satisfy the description given of them and the second that the goods were of merchantable quality. The description of the goggles was that they were fitted with safety-glass lenses. The meaning to be given to safety-glass must be the meaning which those words would convey to an ordinary purchaser who had no technical knowledge. It is wrong to take into consideration any technical meaning which the words may have acquired. It was never pleaded that the words had a special or technical meaning. The evidence showed that safety-glass was made by a process of lamination and in that sense it is true that it was laminated glass; but lamination is descriptive only of a process of manufacture, not of the result of the manufacture. The ordinary meaning of safety-glass is glass so manufactured and constituted as to make it impossible for the glass when splintered to injure the wearer. There was no glass

in 1932 that would not break if it received a sufficiently severe blow, but the safety factor lay in the fact that in safety-glass no broken fragments would become detached from the interlayer.

GREER, L.J. : I have not been able to write a judgment in this case, and I shall have one or two observations to make after my brothers have given their judgments. I will ask them to read their judgments first.

SLESSER, L.J. : In this case, Victor Cyril Grenfell, a lieutenant in the Royal Navy attached to the Royal Air Force, brought an action against E. B. Meyrowitz, Ltd., who are opticians and designers of special spectacles called Luxor flying goggles, for damages for breach of contract. On Feb. 15, 1935, the plaintiff, in the course of his duties, was flying over the Solent in an aeroplane, when his engine failed when he was flying down wind at about 200 feet above the sea and he had to make a forced landing on to the water, his machine reaching the water at about an angle of about 20 degrees at a speed of about 40 miles per hour. When the shock by immersion was over, he found himself still in the cockpit with his right eye profusely bleeding. He had been wearing the goggles which are the subject-matter of this action, but threw them and his helmet into the sea. After half an hour he was rescued, and, although at the time he thought that the injury to his eye was due to the rim of the goggles cutting into it, it was not until Sir Harold Gillies examined him and operated on Apr. 5, 1935, that it was discovered that a splinter of glass was imbedded in the lower eyelid. It is not now disputed by the defendants that this splinter of glass came from the goggles, and it is agreed that the plaintiff's first assumption, that the cuts in his eyelid had been wholly caused by pressure from the rim of the goggles, was incorrect and that the injury was primarily caused by the breaking of the glass. In these circumstances, he brings this action against the defendants alleging that it was an implied term of the contract of purchase of the goggles that they should correspond with the catalogue description thereof, which was Luxor goggles fitted with "safety-glass lenses," or, alternatively, if the goggles did correspond with the description, they were not of merchantable quality. The description relied upon was stated in the particulars of the statement of claim to be contained in a illustrated list of Luxor goggles issued by the defendants, and supplied both in the case of an earlier pair of similar goggles bought by the plaintiff and in one supplied with the goggles referred to in the statement of claim ; and it is the plaintiff's case that he bought these goggles on the faith of such description.

It therefore becomes necessary at the outset to consider the terms of the defendants' catalogue. The goggles in question appear in the catalogue under the heading "Luxor goggles No. 6." In the list some cheaper ones are described without using the word "safety-glass," such

as the first entry, "With white bent lenses, round cushions." But the entry here in question, contains these words: "with hand-ground meniscus safety-glass lenses, round or flat cushions." The jury were asked this question: "Was this pair of goggles equipped with safety-glass?" to which the answer was "No." This answer, in my opinion, having regard to the direction which they received and the course of the case, can only mean that in the event of the glass failing to prove safe, such glass could not properly be described as safety-glass; but such an answer, of course, in no way concluded the question which had to be determined, namely, whether the goods described as with "safety-glass lenses" did or did not comply with that description. In this connection, the first matter to be ascertained was the meaning of the word in the document relied upon, "safety-glass." The construction of this word which is followed by other significant language in the catalogue, to which I shall refer, was, in my opinion, a matter for the judge and not for the jury, and the first question to which his attention should have been directed was this; whether the word "safety-glass" bore its popular meaning or whether it had acquired a special trade meaning known to the purchaser. In my opinion, the evidence of the plaintiff himself is really conclusive upon this point. He was a skilled aviator and had deliberately elected to buy the glasses which he described as meniscus goggles in preference to the service goggles provided by the Ministry, and in cross-examination, stated that he knew that safety-glass was laminated glass—knew at the time he bought these glasses the general principle of safety-glass; that it was two pieces of glass with sticky material in between. Mr. John Wilson, chief chemist to the Triplex Glass Company, who was called on his behalf, said that laminated safety-glass consists of two sheets of glass and a sheet of plastic; in other words, a plastic interlayer, which may be celluloid, cellulose, acetate or synthetic resin. He said also that there were many makes of safety-glass—Triplex, Intacto, Mortex, Curvex and many others. He admitted that it was not possible to make a glass which would not break into laminated fragments, provided you hit it sufficiently hard, and that there was no glass which, if you hit it hard enough, would not smash into fragments which would cause some damage. He said further, that you have only as much safety as you can possibly get within the limits of your materials, and finally, that laminated glass was the only form of safety-glass in use in this country in 1932. He admitted that goggles similar to those worn by the plaintiff were made of laminated safety-glass. Professor Lewis, another of the plaintiff's witnesses, a lecturer on spectroscopy, admitted that the compound word "safety-glass" had come to have a technical meaning or commonly accepted meaning, and that it meant laminated glass, and the witnesses for the defendants agreed in these statements.

The evidence being all one way, it is, in my opinion, impossible to say that the compound word "safety-glass" had not acquired the special meaning of laminated glass with interposed plastic; and impossible to say that the word would denote to the purchaser any warranty of absolute safety. The degree of safety actually achieved would, of course, vary with the quality of the workmanship; but, at the highest, it can mean no more than this, that the glasses sold as safety-glasses in 1932, were as reasonably safe as a proper craftsmanship could make them at that time. Moreover, had the learned judge himself construed the offer contained in the catalogue, he could not have failed to notice that in express terms the catalogue contemplates the possibility of splintering of the safety-glass advertised to be sold, for, at the end of the catalogue, under the heading "Please Note," in clearly printed type, appear these words:

With each pair of Luxor goggles the wearer is entitled to compensation under a Lloyd's policy effected by E. B. Meyrowitz, Ltd., for all medical and/or oculist's expenses incurred in the event of injury to an eye or eyes, or £1,000 in the event of loss of sight of either eye caused by the splintering, whilst being worn, of any Luxor goggles fitted with safety-glass lenses. This insurance can be increased by the purchaser from £1,000 to £5,000 by paying an additional 1s. per thousand premium.

The plaintiff himself had noticed this announcement, and, erroneously as appears from his letter to the defendants of Feb. 26, 1932, took it to be a guarantee, but it is to my mind a strong fortification of the view stated by Mr. Wilson in his evidence, that there was, in 1932 at any rate, no glass which, if you hit it hard enough, would not crash into fragments which would cause damage. In this catalogue, the purchaser is told in terms that safety-glass may splinter and is offered a free insurance to cover this contingency. The conclusion to which the learned judge must have come, had he construed the written document as a whole, would have been that whatever else the expression "safety-glass" may mean, it cannot amount to an absolute guarantee that that glass would never splinter. It follows, therefore, that the plaintiff did obtain that which he purported to buy, namely, "safety-glass goggles" as generally understood by persons making or using them, as are the phrases "safety match" or "safety bicycle."

I do not discuss the further defence, which is more relevant to the reputation of the defendants than to any issue in this case, that these glasses were in fact well over two years old and that the evidence goes to show that if cellulose acetate be used, which, according to Mr. Wilson, is a proper plastic, though not perhaps so good as some others, that the adhesion steadily deteriorates on exposure to light. He himself answered in re-examination that there was no form of laminated cellulose acetate in 1932 where adhesion did not deteriorate well within two and a-half

years—these glasses were bought in Sept., 1932, that is to say, two and a-half years before the accident.

In my opinion, the learned judge, on consideration of the evidence and the documents in this case, should have come to the conclusion that these goods, when sold, fully satisfied the requirements of the Sale of Goods Act, 1893, s. 13, and should not have left the case to the jury; but, on the contrary, should have acceded to the submission of Mr. Beyfus at the end of the plaintiff's case that there was no case for him to answer.

There remains the complaint under the Sale of Goods Act, s. 14 (2), that these goods being bought by description from a seller who deals in goods of that description, there is an implied condition that the goods should be of merchantable quality. Under the subsection the buyer has :

a right to expect, not a *perfect* article, but an article which would be saleable in the market [under the description].

(per WILLES, J., in *Wieler v. Schilizzi* (1), at p. 624) ; they are of merchantable quality if they are :

of such quality and in such condition that a reasonable man acting reasonably would after a full examination accept it under the circumstances of the case in performance of his offer to buy [them].

(per FARWELL, L.J., in *Bristol Tramways, etc., Carriage Co., Ltd. v. Fiat Motors, Ltd.* (2), at p. 841.) In the present case, in my opinion, there is no evidence whatever of failure to satisfy such a test. The learned judge pointed out to the jury that the evidence was much the same on both sides and that the glasses had been used by the plaintiff for two years and six months. There is no reason whatever to suppose, this being the admitted fact, that these glasses should not be treated as a good delivery of safety-glass goggles in 1932 at the time when they were bought, and, if, as appears to be the fact according to Mr. Wilson, all safety-glass with cellulose acetate as plastic were similarly liable to deteriorate, it would have to be said for the plaintiff to succeed on this head that the whole category of goods with cellulose acetate, though properly described as safety-glass, would all be unmerchantable by reason of their tendency to deteriorate by the time when this accident happened. To state the proposition in this form is but to show how impossible it is for the verdict of the jury upon this matter that these goods were not of merchantable quality to be sustained.

This appeal therefore succeeds and must be allowed with costs here and below.

SCOTT, L.J. : The plaintiff in this action seeks to recover damages for breach of contract under the Sale of Goods Act for flesh injuries in the eyelid and round his right eye, received in a flying accident in Feb.,

1935, which he alleges were caused by the breaking of the right glass of a pair of goggles bought by him from the defendants. The general nature of the accident has been sufficiently described by SLESSER, L.J., but there is one aspect of it on which I want to lay emphasis because of its bearing on the question of liability. When the 'plane struck the water its motion, at a speed estimated by the plaintiff at from 30 to 40 miles an hour, would be arrested almost as suddenly as if the machine had struck a solid obstacle like a sand dune. The plaintiff described how he pitched forward, which means that his motion through the air continued, although the motion of the machine had been arrested; and how he hit the triplex wind-screen with his head and how the goggles were driven against his face. In his letter of Feb. 26, 1935, to the appellants he wrote that the *rim* of the goggles had cut "into my eye, and although not damaging the sight, the eye is badly bruised and lacerated round the lids." At that time he evidently did not know that the glass had been broken, but he made it clear that the blow had been severe and sudden.

The action is based on breach of description or alternatively on the ground that the goggles were not merchantable. It is convenient to dispose of the latter issue first. If the goggles were up to contract description, there was no evidence to support the argument that they were not merchantable. The plaintiff in cross-examination said "Yes" to these two questions:

I take it that these glasses are probably very popular in your squadron or at your air base? Do a great many members of the flying corps wear them?

The particular type was clearly a standard make of goggles, advertised and sold in considerable quantity. There was no attempt to prove that the individual pair as distinct from the type was faulty; indeed, they had been in continual use by the plaintiff for 2½ years without complaint. The goggles were plainly merchantable, and the verdict of the jury and the judgment on this head therefore must be set aside.

The main case, however—that the goods delivered did not comply with the contract description—calls for careful consideration. The contract, as pleaded in the statement of claim and particulars subsequently sent by letters, was in writing—an order by letter for a pair of goggles described in an "illustrated list of Luxor goggles" a copy of which, accepted by both sides as correct, was in evidence before the judge and jury. The interpretation of the contract was therefore solely for the learned judge and is now a pure question of law for this court to determine. The statement of claim, para. 3, alleged that the description contained in the list meant "that the said goggles should be fitted with glass lenses so manufactured or constructed as to make it impossible for such glass to splinter and injure the wearer," with the corollary that the mere fact of the glass breaking and splintering was *ipso facto* a

breach of the contract description, entitling the plaintiff to the damages claimed. No question arises on damages, as if the statement of claim was justified in putting the above interpretation on the words of the "illustrated list," the damages awarded would not be open to attack. It is not expressly alleged in the statement of claim that the above absolute undertaking asserted in para. 3 was to last for ever or for any minimum period of time, nor is it alleged that the period of user from Sept., 1932, to Feb., 1935, was shorter than a reasonable duration; but I think we should read the statement of claim as importing an allegation that the absolute undertaking was to continue throughout a period of user of the goggles lasting till after the date of the accident, and that we should consider the case on that footing.

The first question, however, to decide is whether the words of the "illustrated list," which contained the vendors' offer, import any such absolute guarantee against breakage as is alleged. It was contended for the plaintiff that the phrase "with safety-glass lenses" by itself necessarily carried such a signification; but even if there were no other words in the offer which affected the interpretation of that phrase, it seems to me impossible to deduce any such absolute undertaking from the one compound epithet "safety-glass"; even so I should interpret it as connoting not absolute safety, but only a high degree of safety measured by some good practical standard—possibly even by the best standard known to existing practice in the commercial manufacture of glasses for goggles to be used by airmen and motorists. If the undertaking was thus relative and not absolute, the vendor would not incur liability unless the purchaser could prove that the goggles were not up to that manufacturing standard of production. No such proof was attempted in the present case. But in this illustrated list there were other relevant words which constituted a term of the vendors' offer, namely, that the sellers had at their own cost made arrangements, whereby the purchaser would get, free of charge, insurance at Lloyd's to cover certain eye risks "caused by the splintering whilst being worn of any Luxor glasses fitted with safety-glass lenses." This term, being contained in the contractual offer of the sellers, cannot be rejected as forming no part of the contract, and is in my view conclusive against the construction of the phrase "safety-glass" as importing any absolute undertaking against splintering.

On the appeal, it was contended alternatively that if the phrase did on the mere language of the contract import an absolute undertaking against breakage, there was in the evidence proof that it had acquired a special trade meaning which excluded the absolute signification. For this purpose the appellants relied on the undisputed evidence that in 1932 the only method of manufacture of so-called safety-glass was that of lamination—i.e., putting two sheets of glass together, joined

by a transparent substance adhesive in character, and that this fact was known to the plaintiff when he purchased. I do not read the plaintiff's admission in the cross-examination or the other evidence on the point as evidence of a trade usage attaching a trade meaning to the phrase, but rather as proof that that method was the best known method of manufacture and more successful in preventing risk of breakage than any other. It was in my view a surrounding circumstance to be borne in mind in construing a special phrase capable of importing either an absolute or relative guarantee of safety. Used in this way the result is the same as if it had been evidence of a trade meaning, but that use of the evidence is in my view more consonant with legal principle. If for the above reasons the offer only imported a relative degree of safety, the mere fact of a breakage would not be evidence of a breach. That question would depend on a question of degree on the violence, suddenness and direction of the blow—in short, upon the particular stresses set up in the glass. The jury were not directed on this footing, and therefore the appellants would be entitled at least to a new trial. But I cannot for myself see that there was any evidence fit to be left to the jury of a breach of contract on that footing, i.e., of a failure in point of degree. In the nature of things there was no possibility of any scientific information upon which conclusions could be based. A blow received by the glasses when the respondent was thrown suddenly forward against the triplex wind-screen at a speed of say 30 miles an hour, the whole aeroplane including the wind-screen having been brought to a sudden standstill, must have been both violent and sudden, and the bruising of the flesh over the bones surrounding the eye was obviously severe. How can it be said that that was evidence standing by itself of a failure by the sellers to manufacture up to that relative standard of safety which, I think, was alone undertaken? The breakage seems to me at least equally explicable on the footing of a sudden stress which a glass up to any relatively high standard, such as I have predicated as the contract standard, could not withstand. I myself should be ready to enter judgment for the appellants even on the above analysis of the case.

But the appellants' case is stronger even than that. It was common ground that this was the usual, and the best, method of manufacture of all safety-glass which obtained in this country in Sept., 1932, and continued until at any rate the middle of the year 1934. Its principle was that the transparent adhesive which held the two layers together was itself a source of strength—i.e., of resistance to fracture—and also, in the event of an accident causing fracture tended to prevent detachment of the broken pieces from the adhesive. The plaintiff understood this principle. But it was also in evidence that at that date there was no known method of making the adhesive medium last indefinitely, and this fact too was known to the plaintiff. I think, therefore, that this

tendency of the "safety" quality to wear out must be regarded as a further limitation upon the word "safety" in part of the then current meaning of the phrase "safety-glass." One year was the period stated by the defendants' expert as the limit of duration of full adhesion to be expected of glasses in 1932, but even doubling that estimate, the lapse of $2\frac{1}{2}$ years from the date of sale in the case of the plaintiff's pair might well have reduced the adhesion considerably. This evidence was not cross-examined to.

But there is still a further weakness in the plaintiff's chain of proof. There was no satisfactory evidence that the adhesion between the glass and adhesive had ever failed. The small splinter extracted from the tissues near the eye had no adhesive still adherent when examined for the purpose of ascertaining whether that was so. But the adhesive might have become detached at various stages in its history between the moment of first breakage and the time when the small piece of glass was examined by the witnesses for the plaintiff; and this possibility was never excluded by the evidence for the plaintiff.

It follows that in my view there was no evidence in support of the plaintiff's claim that the goggles delivered were not in accordance with the description contained in the written contract, when properly construed. On this ground the appeal must be allowed, the verdict and judgment set aside and judgment entered for the defendants. It is therefore unnecessary to consider the grounds of application for a new trial.

GREER, L.J. : I agree with the conclusions which have been stated by my brethren, and with the result of those conclusions, namely, that this appeal must be allowed with costs, and the judgment be set aside, with costs in the court below. I do not agree with every word that has been said in the judgment of SLESSER, L.J., but substantially I agree with his reasoning, as well as with the conclusions to which that reasoning has led.

When a plaintiff, such as this plaintiff, sets out to recover in an action damages for breach of contract, he has got to prove two things. First of all what his contract was, and, secondly, whether there has been any breach of that contract. The learned judge unfortunately, I think, left the question in general terms to the jury as to what the contract was, but I think that makes no difference to the result, because if he had given what I conceive to be the right definition of the written words in the contract the result would have been exactly the same, namely, that there would have been no evidence that the alleged breach was a breach of the written undertaking. The written undertaking, as I understand it, is that which is to be implied from the words "safety-glass lenses." Now, what is the danger from which people who buy goggles desire to be protected? It is quite obviously the danger that the

glasses may splinter, but I agree that there is no absolute undertaking by the use of the word "safety-glass" that the glass will not splinter in any circumstances whatsoever. I think it indicates that a reasonable degree of safety has been arrived at in respect of the glasses sold under the term "safety-glass" lenses, and that that does not mean absolute safety in all circumstances, but only safety under normal stresses. I agree with what is said by SCOTT, L.J., as to the facts of the accident which happened here, and I agree that it was only when subjected to an abnormal stress that this accident happened to the unfortunate plaintiff. If that is so, there would be then in the facts of the case, no evidence that there had been any breach of that which is implied in the contract by the use of the words "safety-glass lenses."

Then another question arose which I think was properly left to the jury, but not strictly in the proper way. It does not follow because words in their natural meaning have a meaning attached to them by the plaintiff that they necessarily have that meaning in the circumstances of the case, and I think it was abundantly proved by the evidence on both sides—evidence for the defendant and evidence for the plaintiff—that to the knowledge of the plaintiff the words had acquired this special meaning at the time he made his contract of purchase, and that having regard to the evidence given on both sides the learned judge was bound to tell the jury that in this case it had been established beyond controversy that the words had acquired a special meaning, namely, a meaning which was directed to the method of manufacture, rather than to the result of that manufacture. That being so, it is quite clear that there was no evidence to be left to the jury which would justify a judgment in the plaintiff's favour.

With regard to the observations which have been made by my brethren with reference to the note on the last page of the folder, I find myself not in agreement with the views expressed by them. Assume for the moment that the real meaning of safety-glass is unsplinterable glass, it would not cease to have that meaning because the sellers undertook, in addition to giving an undertaking that they would supply glass, that they were prepared to give the buyer a Lloyd's policy which would protect him for twelve months. If he was entitled under the description to some protection which the Lloyd's policy gave him, he would be entitled to say to the court and to the jury: "An accident has happened to me by reason of a breach of the description of that which was sold at a period after the policy had expired," and he would none-the-less be entitled to succeed because he had had in the first year the additional advantage of a policy with the premium paid on his behalf. However, that is a matter of very small importance in this case, because I have come to the conclusion that, in the circumstance, the contract alleged was not proved, and the breach which would have entitled the plaintiff to succeed was

not proved, and therefore it ought not to have been left to the jury.

On the question as to whether there was a further implied contract of merchantability, I think there is no doubt there would be an implied contract that the goods were merchantable under the description under which they were sold, but once it has been decided that they were in accordance with that description it is impossible to hold that they were unmerchantable, when in fact large quantities of them under that description have been sold from time to time and accepted as good delivery under the contract.

For these reasons I agree with my brothers that this appeal should be allowed, with the consequences already stated.

Solicitors : *Lovell, White & King* (for the appellants) ; *Kenneth Brown Baker, Baker* (for the respondent).

[*Reported by* LESLIE CARNEGIE, ESQ., *Barrister-at-Law.*]

THOMAS v. ATTORNEY-GENERAL.

[CHANCERY DIVISION (Farwell, J.), July 15, 1936.]

Practice—Originating summons—Application for declaration as to powers—Powers under Settled Land Act, 1925, and under private Act—Whether powers extended by public Act—Discretion of court—R.S.C., Ord. 54A, r. 1A.

The trustees of the Carnarvon Harbour Board, desiring to have determined by the court whether, having regard to the provisions of the Settled Land Act, 1925, and certain relevant provisions in the private Acts of the trustees, the powers which are given by the Settled Land Act, so far as they are wider than the powers which are given by the private Acts, may be exercised, and to what extent the powers under the private Acts may be treated as extended, brought a summons under R.S.C., Ord. 54A, 1A, making the Attorney-General defendant. The Attorney-General objected that this was not a case where the court ought to entertain the application, as it was not a case where the trustees had exercised some power and some person who thought himself aggrieved was seeking to obtain relief, nor was it a case where the Attorney-General himself was taking proceedings to obtain an order upon the trustees not to do certain things which he alleged were in breach of their duty:—

HELD: it is in each case a question of discretion whether the court ought to make a declaratory order, and in the present case such an order should not be made.

[EDITORIAL NOTE.] The limits of the discretionary power to make a declaration were considered in the House of Lords in *Russian Commercial & Industrial Bank v. British Bank for Foreign Trade, Ltd.*, [1921] 2 A.C. 438; 30 Digest 144, 199. The discretion is a very wide one, but it is accepted that a declaration will not be made in respect of future rights, nor, in a case where no claim has been made, will a declaration be made that no claim exists. The construction of a statute was treated as a purely academic question in *Tindall v. Wright* (1922), 86 J.P. 108; 30 Digest 144, 202, and a declaration was refused. In the present case it was refused upon similar grounds and more particularly upon the ground that all the parties interested in the matter were not before the court.

AS TO DECLARATORY JUDGMENTS AND ORDERS, see HALSBURY, Hailsham Edn., Vol. 19, pp. 212-217, paras. 511-514; and FOR CASES, see DIGEST, Vol. 30, pp. 140-154, Nos. 166-264.]

Cases referred to:

- (1) *Dyson v. A.-G.*, [1911] 1 K.B. 410; 30 Digest 142, 184.
- (2) *Deare v. A.-G.* (1835), 1 Y. & C. Ex. 197; 11 Digest 523, 289.
- (3) *Re Clay, Clay v. Booth, Re A Deed of Indemnity*, [1919] 1 Ch. 66; 30 Digest 144, 201.
- (4) *Hodge v. A.-G.* (1838), 3 Y. & C. Ex. 342; 11 Digest 523, 290.
- (5) *Ellis v. Bedford (Duke)*, [1899] 1 Ch. 494; [1901] A.C. 1; 30 Digest 150, 238.
- (6) *Christ's Hospital (Governors) v. A.-G.* (1846), 5 Hare, 257; 8 Digest 397, 2215.
- (7) *Clum Hospital (Warden and Brethren) v. Powys (Lord)* (1842), 6 Jur. 252.
- (8) *Wellbeloved v. Jones* (1822), 1 Sim. & St. 40; 8 Digest 397, 2218.
- (9) *Re King, Jackson v. A.-G.*, [1917] 2 Ch. 420; 8 Digest 401, 2301.
- (10) *A.-G. v. Shrewsbury (Kingsland) Bridge Co.* (1882), 21 Ch. D. 752; 16 Digest 487, 3688.
- (11) *A.G. v. Sharp*, [1931] 1 Ch. 121; Digest Supp.
- (12) *London County Council v. A.-G.*, [1902] A.C. 165; 16 Digest 482, 3637.

ADJOURNED SUMMONS taken out under the provisions of R.S.C., Ord. 54A, r. 1A, and asking for the determination of certain questions relating to the powers exercisable by the trustees for the purposes of the Carnarvon Harbour Acts, 1793 to 1903, the plaintiff Thomas Rees Thomas suing as the clerk to the trustees. The Attorney-General, who was made defendant to the summons, as representing the public, took the preliminary point that he was wrongly made a party to the proceedings.

R. M. Montgomery, K.C., and *M. Beebee*, for the plaintiff: The question of the powers of the Carnarvon Harbour Trustees has arisen in a practical form because they are in negotiation with regard to the letting of part of their lands which surround Carnarvon Harbour. Before exercising their powers they desire the court's construction of the Settled Land Act, 1925, in order to make sure if the powers given by that Act apply to them.

The Attorney-General (Sir Donald Somervell, K.C.), and *J. W. Brunyate (A. Andrewes Uthwatt with them)*: It would be a startling and novel principle if the plaintiff was allowed to sue the Attorney-General in a case of this kind where no dispute is in existence and no loss has been suffered.

[FARWELL, J., referred to *Re Clay, Clay v. Booth* (3)].

The Attorney-General: That is a good illustration of the fact that the giving of a declaration is always discretionary. But the cases where trustees, who have been doubtful whether a certain act is justified and whether the rights of persons who cannot appear before the court might be affected, have been able to get protection in the form of a declaration are exceptions to the general rule that there must be a dispute. The cases in which the Attorney-General is properly sued fall into well-recognised categories; see ROBERTSON'S CIVIL PROCEEDINGS FOR AND AGAINST THE CROWN, pp. 483-4. These are examples of cases where the Attorney-General is properly made a party because a legal right of the Crown is in question. The point of *Dyson v. A.-G.* (1) which followed *Hodge v. A.-G.* (4) is that, in cases where subjects have a cause of complaint against the exercise of statutory powers by government departments and officials, a declaration is proper. But that case is not this case. See also *Ellis v. Duke of Bedford* (5), in which the House of Lords could not understand why the Court of Appeal ordered the Attorney-General to be joined.

I agree that it has often been held that the Attorney-General may be made a party in proceedings relating to charities, but the relation of the Crown to charities is a very special one. The first case in which this was done was *Governors of Christ's Hospital v. A.-G.* (6). See also *Warden and Brethren of Clum Hospital v. Lord Powys* (7), *Wellbeloved v. Jones* (8), and *Re King, Jackson v. A.-G.* (9), at p. 428. Somewhat similar words have been used in relation to the Attorney-General's powers to prevent

an improper use of public funds and to prevent corporations exceeding their powers : see *A.-G. v. Shrewsbury (Kingsland) Bridge Co.* (10).

[FARWELL, J., referred to *A.-G. v. Sharp* (11).]

The Attorney-General : But it is a complete *non sequitur* to suggest that, because the Attorney-General has power to take proceedings against public bodies when they exceed their powers he should be made defendant, to decide in advance whether certain acts if done are or are not acts in respect of which he would take such proceedings. If these proceedings are allowed the discretion which LORD HALSBURY in *L.C.C. v. A.-G.* (12), at p. 168 placed in the Attorney-General will be completely destroyed. There is no precedent for what the plaintiff is now claiming.

FARWELL, J. : If I were to make the declaration asked for by the plaintiff, and the trustees were to grant a lease, disregarding the limitations of their private Acts, would it not be open to the lessee to say subsequently that that was not a proper exercise of the trustees' powers, and that the lease was not binding on him, since a decision in proceedings between the plaintiff and the Attorney-General was not binding on him ?

The Attorney-General : It would be very doubtful whom a declaration of this kind would bind. This case is not like charitable cases in which a declaration binds everybody because the Attorney-General represents the public.

Montgomery, K.C. : These are properly instituted proceedings. The purpose of the rule under which they are taken is that trustees for public purposes shall be able to discover what is the meaning of an Act so as to protect themselves from prohibition or an injunction. But these proceedings will be futile from the point of view of public trustees unless they can bring in the Attorney-General. If the Attorney-General is made a party, as he represents the public, the result of the proceedings will be an entire protection for the trustees. The question whether a declaration, if made, would bind a possible lessee is only a subsidiary point, but it is difficult to believe that a lessee who entered into an arrangement, after a decision had been given between the Attorney-General and the lessors, that such an arrangement was within the lessors' powers, would be allowed to say that what was done was illegal. I agree that the question of discretion is important, but this is exactly the kind of case in which the discretion ought to be exercised in favour of the trustees who are trustees for public purposes and only want to do what is right. I agree also that the Attorney-General is entitled to exercise his own discretion as to whether he will be a party to proceedings, provided it is confined, as it was in *L.C.C. v. A.-G.* (12) to the initiation of proceedings. But, as the rule with regard to charities shows, that rule cannot be applied so as to allow the Attorney-General to decide for himself whether he will be made a party to proceedings. This matter is exactly one in which he should be made a party. It involves

no facts but only the construction of a document. It affects the public and the only way in which the public can be represented is by the Attorney-General. Moreover, it is a typical case as there are probably many other cases where it is most important for people to know what is the meaning of the Settled Land Act when read in conjunction with the powers conferred by local Acts similar to the ones in question here.

FARWELL, J. : This is a summons which is taken out under R.S.C., Ord. 54A, r.1A, and that order provides that :

In any division of the High Court, any person claiming to be interested under a deed, will, or other written instrument, may apply by originating summons for the determination of any question of construction arising under the instrument, and for a declaration of the rights of the persons interested.

The position of the parties to this summons is this : The plaintiff is the clerk to the trustees for the Carnarvon Harbour Board, being the proper officer to sue under the provisions of their private Acts, and the defendant is His Majesty's Attorney-General. The summons is brought for the purpose of having a determination by the court as to whether, having regard to the provisions of the Settled Land Act, 1925, and certain relevant provisions in the private Acts of the trustees, the powers which are given by the Settled Land Act, so far as they are wider than the powers which are given by the private Acts, may be exercised, and to what extent the powers of the private Acts may be treated as extended. The Attorney-General here has taken the point that this is not a case where the court ought to entertain the application at all, as this is not a case where the trustees have exercised some power, and where some person who thinks himself aggrieved by the exercise of that power is seeking to obtain relief. Nor is it a case where the Attorney-General himself is taking proceedings to obtain an order upon the trustees not to do certain things, which he alleges are in breach of their duty. The trustees of the Harbour Board here are asking the court to make simply a declaration as to their powers in respect of leasing and otherwise, without there being any immediate question to be tested as to any powers which they have already exercised. That the court has power to make declaratory judgments or orders is quite plain and is expressly provided for by R.S.C., Ord. 25, r. 5, which provides :

No action or proceeding shall be open to objection, on the ground that a merely declaratory judgment or order is sought thereby, and the court may make binding declarations of right whether any consequential relief is or could be claimed or not.

But that power given to the court to make declaratory judgments or orders is purely discretionary, and the court is not bound to entertain such an application except in a proper case. If authority is needed for that proposition it is to be found, among other places in the judgment

of FARWELL, L.J., in *Dyson v. A.-G.* (1), and the first question I have to determine is whether the plaintiff here is entitled to come to the court and require the court to determine what the extent of the trustees' powers is, those powers not having been exercised, so far as I know, in any way contrary to whatever their rights may be, and no one at the moment being aggrieved, so far as I know, by the exercise of those powers. The trustees want a declaration which will enable them to know exactly what their powers are in the future.

There is no doubt that in the case of charity the Attorney-General's position is in some ways peculiar. He represents all charities, generally speaking, and in any case where there is a gift or an intention to benefit charity in general, without any definition of any particular charity, then the Attorney-General is necessarily a party to all proceedings brought in connection with any question of that kind, because there is no one else who can represent charity in general. Where there is a named charity and there is no doubt as to the identity of that charity, it is not necessary to make the Attorney-General a party to the proceedings, but, as I have said, in any case where there is a general charitable intention, without any definite charity, then of necessity the Attorney-General is a party to any proceedings in connection with the matter, because there is no one else to represent charity. The Crown as *parens patriæ* is the protector of all charities, and the Attorney-General, as representing the Crown, has to represent charities in all senses and must always be made defendant in proceedings. No objection can be taken that he is made a defendant to such proceedings although he himself might not have desired that they should have been taken. The Attorney-General is also, of course, in connection with charities, in a position to move the court himself in cases where some breach of a public duty is committed, and to have the matter put right. In many cases of that kind there is no one else who is in a position to move the court, and for that reason again the Attorney-General is entitled, and bound, to take the necessary steps. But in my judgment all these considerations in connection with charities really do not touch the point which I have to consider. Here the trustees of the Harbour Board have got certain powers of leasing. They might exercise their powers in a way which was not consistent with the powers which are given to them by Act of Parliament, by granting a lease to some particular individual. And it might be that a particular individual would, on discovering the position, have a right against the Harbour Board to have the lease rescinded, or have some other similar right. No doubt in such a case as that, where the Harbour Board Trustees had exceeded their powers, the Attorney-General would be entitled to intervene if he thought fit, and to seek an order from the court which would prevent any future wrong exercise of the powers of the trustees. But it is purely a matter

in the discretion of the Attorney-General, whether he will take any such proceedings or not, and it might well be, that, in cases where there had been some technical breach of the powers given to the trustees, he might yet think that the exercise of their powers on the whole was a beneficial one, and he might not choose to take any proceedings to interfere in such an exercise. It would be a matter for the Attorney-General, and he alone could determine whether, as Attorney-General, he would take any steps in such a case as I have mentioned.

If the plaintiff in this case is entitled to the relief which he seeks, then in one sense the decision of the court must operate to fetter the Attorney-General's discretion in the future, because, having once got a decision of the court that a particular power is one which the trustees could exercise, so far as the Attorney-General is concerned, that would obviously prevent him from taking steps that he might have taken in other circumstances. It is accordingly a question whether the court ought, in a case of this kind, to give a decision against the Attorney-General as defendant, which would have such an effect. I have not been able to find, in any of the authorities which have been cited to me, any case which is exactly on all fours with this present case, which does, as it seems to me, involve a question of real importance at the present moment. There are no doubt many trustees of public institutions or public undertakings who would be only too glad to know what the true interpretation of their Acts may be in connection with some public legislation, and if the court in this case is bound to entertain this application, it appears to me that there would be many other applications of a similar kind, raising all sorts of questions in connection with the acts of such trustees. That possibility, of course, is not a reason in itself for saying that this application ought not to be entertained, but it does seem to me to be of some importance in this case. I think the court ought to consider very carefully whether such an application ought to be entertained, not merely because it would, or might, throw, a heavy burden on the Attorney-General, but because it is a matter of real importance whether, in a case of this kind, the Attorney-General should not be left to take such steps as he is advised, or, when he thinks proper so to do, to move the court to restrain anything which he thinks is an improper use of the powers given to trustees, rather than that such trustees should be permitted themselves to bring proceedings, and obtain a decision upon a point which is not a practical point at the moment in the sense that the power in question has not been exercised.

Of the cases which have been cited to me, the nearest to the present one, as it seems to me, is the case to which I have already referred, that is to say *Dyson v. A.-G.* (1). *Dyson's* case (1) was a decision of the Court of Appeal in which it was held that the court could intervene and give a declaratory judgment. It is necessary, therefore, to look a little

closely at that decision in order to see precisley what was decided. It was a case in which an action was brought against the Attorney-General by a member of the public to test the validity of a certain form of notice issued by the commissioners of inland revenue, which was, at the time, very familiarly known as form 4. Many members of the public strenuously objected to what they thought were the inquisitorial methods adopted by the commissioners of inland revenue in connection with that form of inquiry and, that being so, one member of the public brought an action against the Attorney-General for a declaration that it was *ultra vires* for the commissioners to issue such forms to the public, and to require them to answer the questions which were put in them. In those circumstances the Court of Appeal came to the conclusion that the proceedings ought to be entertained, and I desire to refer to one or two passages in the judgment of FARWELL, L.J., for the purpose of seeing precisely what the principles were on which the court proceeded. Perhaps I may be allowed to say that in choosing to refer to that judgment rather than to the other judgments of the court I am not wholly influenced by filial feeling, or by any feeling of disrespect to the other members of the court, but I do so because FARWELL, L.J., does deal with a little more clarity with the points with which I am concerned here. FARWELL, L.J., says at p. 421 :

In a case like the present the Attorney-General is properly made defendant. It has been settled law for centuries that in a case where the estate of the Crown is directly affected the only course of proceeding is by petition of right, because the court cannot make a direct order against the Crown to convey its estate without the permission of the Crown, but when the interests of the Crown are only indirectly affected the courts of equity, whether the court of chancery or the exchequer on its equity side (see *Deare v. A.-G.* (2), at p. 208), could and did make declarations and orders which did affect the rights of the Crown.

Then he cites certain cases to which I need not refer and continues at p. 422 :

There it was argued that there is no precedent for such an order as is asked in this action.

And he points out that before the Judicature Act it might be that the court of chancery would not make declaratory orders, but that since that Act the court has power to do so. Then he says this at p. 423 :

But the court is not bound to make declaratory orders and would refuse to do so unless in proper cases, and would punish with costs persons who might bring unnecessary actions : there is no substance in the apprehension, but if inconvenience is a legitimate consideration at all, the convenience in the public interest is all in favour of providing a speedy and easy access to the courts for any of His Majesty's subjects who have any real cause of complaint against the exercise of statutory powers by government departments and government officials.

There FARWELL, L.J., is pointing out that it is in the public interest that

a person who has cause of complaint should be able to get relief speedily and easily from the courts. But that is a wholly different proposition from the proposition that the trustees of public undertakings of the kind in question in the case now before me are entitled, whenever they are faced with a question of construction of their own Act, or their own Act in combination with other Acts, to come to the court, making the Attorney-General a party, and to demand from the court a decision upon the question of doubt which has arisen. It is, in my judgment, in each case a question of discretion whether the court ought to make declaratory orders of this kind, and in my judgment in a case of this sort the court ought not to exercise its discretion by making such an order. If, and when, the trustees do act, as they no doubt will act in accordance with the opinion which they have received, and if they do something which is beyond their powers and *ultra vires*, it will then be for the Attorney-General to determine whether he will take proceedings against them, or whether he will not. But in my judgment the court ought not, in a case of this kind, to make an order which, as I have already pointed out, would, or might, have the effect, at any rate to some extent, of fettering the discretion vested in the Attorney-General.

But apart altogether from the above considerations, it seems to me that there is another difficulty in the way of the plaintiff. I will assume that the trustees exercise, as they believe rightly, the power of leasing which they have, and that they grant a lease to a person which is ultimately decided by the court to be *ultra vires*. In such circumstances the person aggrieved, that is the lessee, might, I suppose, bring proceedings against the trustees for a declaration, for instance, that the lease was not binding on him and get the relief which he seeks on his own behalf and without joining the Attorney-General; and I am not at all satisfied whether, if I were to make a declaration to-day in these proceedings, that such a declaration would technically bind a person in the position of a lessee which I have suggested. I am not at all satisfied that such a lessee might not say: "I was not a party to the proceedings when this question was raised and I am not bound by any order of the court made in proceedings brought in the form in which they were brought. Here are the particular facts which I have proved to the court which give rise to the question at issue in the present proceedings, and I ask the court to determine that question as between the trustees and myself, and not to feel themselves in any way bound to give effect to what I say was a wrong decision of the court in the former proceedings." If the present proceedings were taken to the highest court no doubt the position would be that the decision of that court would have the effect of binding everybody, but it seems to me that it would be a cause of grievance to some person who desires to bring proceedings against the trustees for some alleged breach of their duty, to find himself debarred

from obtaining any relief because the court had, in some other proceedings, in which the Attorney-General alone was a party, and in which the only questions raised in the particular case by the lessee were not before the court, made a declaration in general terms which would preclude the person who thought himself aggrieved from having his question determined by the court.

In all the circumstances of this case I think that I ought not to entertain this application. It seems to me that, exercising the discretion which I quite clearly have as to whether I will make an order or not, I ought to exercise it against the plaintiff and the only result that that can have is that the summons must be dismissed with costs.

Solicitors : *Hatchett Jones & Co.*, agents for *Trevor, Roberts & Simons*, Carnarvon (for the plaintiff); *Treasury Solicitor* (for the Attorney General).

[*Reported by C. M. YOUNG, Barrister-at-Law.*

ROFE v. KEVORKIAN.

[COURT OF APPEAL (Greer, Slessor and Scott, L.JJ.), July 27, 1936.]

Practice—Interrogatories—Interrogatories to executors—Matters believed by deceased—Matters of expert opinion—R.S.C., Ord. 31, r. 2.

R. sold some Indian miniatures to K. by auction. R. died and his executors brought this action for the balance of the purchase price. K. alleged that the miniatures were not genuine and that R. was guilty of fraud. K. obtained leave to administer interrogatories asking the circumstances in which R. had obtained the miniatures; whether he believed that their description in the auction catalogue was accurate and that they corresponded with it; and whether the goods were spurious and, if so, whether R. or the auctioneers knew it. The executors appealed:—

HELD: (i) the interrogatory asking where R. had obtained the miniatures, though it might be an admissible question in cross-examination, was a fishing interrogatory.

(ii) executors ought not to be asked to swear to the belief of the deceased.

(iii) a party should not be interrogated on a question which he can only answer by consulting an expert and repeating the expert's opinion.

[EDITORIAL NOTE.] The question of what interrogatories may be administered to executors who are plaintiffs seems not to have been fully considered before, and as they can, as a general rule, have but an imperfect knowledge of events that have happened in the lifetime of the deceased, it seems proper that the scope of such inquiries should be severely limited. There is also considered here another class of interrogatories to which objection may be properly taken. These are such questions as only an expert can answer, so that the person interrogated would be bound in practically every case to obtain expert assistance in order to answer the question put to him. In such a case he could hardly answer such a question on oath, as he has not the necessary knowledge himself.

AS TO OPPRESSIVE INTERROGATORIES, see HALSBURY, Hailsham Edn., Vol. 10, pp. 413, 414, para. 498; and FOR CASES, see DIGEST, Vol 18, pp. 198-200, Nos. 1460-1479.]

APPEAL by the plaintiff executors from an order made by GREAVES-LORD, J., at chambers, on July 7, 1936, allowing a number of interrogatories to be administered to the plaintiffs and reversing an order made by the learned master in chambers.

Jack Samuel Rofe, deceased, sold to the defendant, Kevorkian, through Messrs. Sotheby and Co., auctioneers, a number of oriental miniatures. These were described in the sale catalogue as valuable oriental manuscripts and miniatures comprising a series of very important Indian drawings by the court painters of the great Moghul Emperors, Shah Jahan and Aurangzib. The catalogue further set out that the miniatures (lots 101 to 148) originally constituted parts of an album apparently made for Shah Jahan in which were four leaves of illuminated Persian manuscript setting forth that the best artists and scribes of the day had been commissioned for the work. The sale catalogue contained further description. The miniatures were knocked down to the defendant

for £10,500. From time to time he paid sums on account, and in 1932 he made an agreement to pay £6,000, a sum less than the balance due, by stipulated instalments. He failed to pay some of these instalments, and the plaintiffs, the executors of Rofe, who had died in the meantime, brought the action, claiming the balance of the purchase price. The defendant filed a defence attacking in detail the authenticity of the miniatures and alleging mutual mistake and fraud by Rofe. An action had in the meantime been commenced in the United States, and experts called on both sides gave contradictory and very voluminous evidence, which was available if the parties consented to use it.

Discovery was given, but shortly before the case was due to come on, the defendants asked leave to administer a large number of interrogatories. The master in chambers refused to allow these, but the learned judge on appeal allowed the following :

3. Whence and from whom and upon what date did the aforesaid Rofe obtain the goods included in lots 101 to 148 inclusive of the catalogue referred to in para. 3 of the re-amended defence and counterclaim herein ?

10. On or before Dec. 12, 1929, did the said Rofe believe that the description in the aforesaid catalogue was accurate and that the aforesaid goods corresponded with the said description ?

13. Was not the aforesaid catalogue description inaccurate in all or some and if so which of the respects stated in para. 3 of the re-amended defence and counterclaim ?

15. Look at the goods comprised in lot 102 of the said catalogue. Is it not the fact that the goods in the said lot are not of the period of Shah Jahan ? Is it not the fact that the said goods were made in the latter part of the 18th or early part of the 19th century ? If yea, were either the said Rofe or Messrs. Sotheby & Company aware of this fact on or before Dec. 12, 1929, and if not upon what date and how did they or either of them become aware of it ?

16. On or about Feb. 11, 1932, did the said Rofe believe that the descriptions in the aforesaid catalogue was accurate and that the aforesaid goods corresponded with the said descriptions ?

The plaintiffs appealed.

F. van den Berg, K.C., and *C. H. Duveen*, for the appellants.

J. W. Morris, K.C., and *W. Arthian Davies*, for the respondent.

van den Berg, K.C. : These interrogatories cannot be answered by the plaintiff. An executor cannot swear to a matter which is at best one of expert opinion ; he can only answer by repeating the opinion of an expert. Such opinions have already filled two printed volumes in the American litigation. Moreover, an executor cannot swear to the belief of the deceased. Interrogatory 3, though it might be admissible as a question in cross-examination, deals with a matter too remote for an executor. The courts have always distinguished between questions suitable for cross-examination and questions suitable for interrogatories. One of the executors has already been cross-examined at length on this point in the American action, and to require him to answer the question again

would be oppressive. Moreover, the interrogatories are futile, because they would not give any real assistance. They would not comply with the condition laid down in R.S.C., Ord. 31, r. 2 : that they are necessary for disposing fairly of the cause or for the saving of costs.

Morris, K.C. : The authenticity of the miniatures is one of the chief issues of fact in the case. If the defendant at this stage of the action can get an admission from the plaintiffs on these questions of fact, he will save a considerable amount of money in the case by eliminating the calling of evidence. Some matters may be the subject of such consensus of opinion that they become in reality matters of fact. No. 3 is relevant on the issues of knowledge and of fraud. No documents were produced on discovery disclosing the source of the miniatures. These interrogatories are an alternative to procedure by discovery. No. 10 is relevant on the issue of mistake ; moreover, the deceased might have told his executors what he believed. This question could have been asked of the deceased himself while he was alive ; the issue remains the same, and it may be asked of those who represent him in this action. No. 13, if answered properly, might shorten the trial, for it asks for admissions on a series of important matters raised in the defence and counterclaim.

GREER, L.J. : This is an appeal from the learned judge in chambers allowing certain interrogatories to be administered by the defendant to the plaintiffs in this peculiar action. The master having disallowed all these interrogatories, there was an appeal to GREAVES-LORD, J., who allowed some of them while disallowing others. In my judgment none of these interrogatories ought to be considered necessary either for disposing fairly of the case or for saving costs within the meaning of R.S.C., Ord. 31, r. 2. The action was a peculiar one and the position of the parties was peculiar in this respect. During the life of Mr. Rofe, for whom Messrs. Sothebys sold a number of old Indian miniatures, an action was brought in America by him against the defendant. Witnesses were examined in that action, and then, unfortunately, Mr. Rofe died, and the only people who could assert his rights were his executors, who are the plaintiffs in this action. In his defence the defendant says first of all that the document on which he bought the miniatures—namely, the particulars of sale—contains certain statements which were untrue in fact. The sale was conducted by Messrs. Sothebys, and it is right to say at once that no charge is made in the proceedings that they did anything that was dishonest or that they were guilty of any fraud in making this statement. What is said is that Mr. Rofe falsely pretended that these miniatures were what they purported to be in the particulars of sale. The action has been going on for a very considerable time ; there has been discovery, and when the case was almost ready for trial these interrogatories were submitted.

In my judgment no useful purpose could possibly be served by an interrogatory like no. 13 or no. 15. Though it is quite true to say that the question in whose reign the particular picture or miniature came into existence is in form a question of fact, and the question whether the miniature was painted by A.B. or was not painted by A.B. is in form a question of fact, nevertheless in the year of grace, 1935, 1936 or 1937, as the case may be, that question necessarily resolves itself into a question based upon the opinion of experts, called on the one side or the other side, who are familiar with the kind of picture that is under consideration. It may well be that when the defendant comes to give his evidence he will have sufficient expert opinion to justify him in saying that the statements contained in the prospectus were not in accordance with the facts. On the other hand, it may well be that the weight of expert opinion is on the side of the plaintiffs and in favour of the view that there were several indications in the nature of internal evidence, to be perceived by looking at the pictures themselves, which satisfied Mr. Rofe that what he said about them was in fact true. I can see no ground whatever for allowing any of these interrogatories. The interrogatories, all except no. 3, deal with considerations of the same kind—considerations in which the questions of fact can only be determined by evidence of experts on one side or the other. It does not seem to me right that the plaintiffs should have, by answering interrogatories, to expose to the defendant the kind of evidence he is going to put before the judge or jury at the trial.

Question no. 3 reads :

Whence and from whom and upon what date did the aforesaid Rofe obtain the goods included in lots 101 to 148 inclusive of the catalogue referred to in paragraph 3 of the re-amended defence and counterclaim herein ?

If that interrogatory had stood by itself, possibly it might have been said to have some relevance to the question which had to be determined. It is conceivable that, if it should be established, either by admission or otherwise, that Mr. Rofe obtained the goods which he sold to the defendant at a very low price from somebody whose description of the goods he was not prepared lightly to believe, having regard to his station in life and the man he was, some argument might be put forward in support of that interrogatory. It is, however, in the nature of a fishing interrogatory, trying to get, for the purpose of the defendant's case, evidence which he has not already got. On those grounds, having regard to what has frequently been decided : that because any question is a proper question to put in cross-examination it is not, therefore, necessarily a proper question to be put in interrogatories, I have decided that interrogatory 3 also ought to be disallowed as being a fishing interrogatory by a man who is trying to make a case and has not already the

evidence which would justify him in making the case. For these reasons I think that the learned judge was wrong and the master was right; the appeal must be allowed and the master's order restored.

SLESSER, L.J. : I am of the same opinion, but in so far as we are differing from the learned judge, and in so far as the interrogatories here asked are of a rather peculiar nature, I think it is right to add a few words. The interrogatories here to be considered fall into three classes. The first class, which includes nos. 13 and 15, ask substantially whether the goods are described accurately in the catalogue or not. [His Lordship read interrogatories 13 and 15.] In my opinion these are not questions which can properly be addressed to the executors representing the estate of the late Jack Samuel Rofe in these proceedings. I think a distinction must be made—it has often been made before—between information to be derived from an agent or servant which is or ought to be within the knowledge of the principal, and information to be derived from other persons altogether. These executors cannot be said to be the principals of the only persons who could have this information—namely, the persons expert in ancient Persian art—and there is no obligation upon them to ask other persons having information, who are not their servants or agents, for information on the subject. As is stated in the book of the late JUDGE BRAY upon this topic, at p. 142 :

There is no obligation on the party to apply for information to persons who are not or have not been his agents.

Now if such information be not applied for, it is clear that the person interrogated has himself no information on the subject at all, and to ask him such a question could not be said, within the meaning of R.S.C., Ord. 31, r. 2, to be necessary for disposing fairly of the cause or for the saving of costs. The only information which could be obtained would be from experts whom he is under no obligation to consult.

There is another difficulty. These executors are asked to answer questions of fact. It is true, as my Lord said, that in one sense a final decision of fact must be arrived at from the opinions of the experts. But the opinions of the experts as given to these executors, if repeated by them on oath in answer, can be no more than a repetition of the opinions of a third party. The executors cannot state as a fact whether those opinions were correct or not. The experts may differ, and they may even change their own minds between the time of answering the interrogatory and the trial. I think that those are not questions which can be properly put within the meaning of R.S.C., Ord. 31, r. 2, and I think that in any event they would be vexatious and oppressive.

The same observation applies to questions no. 10 and no. 16, which relate to the belief of a deceased person. A man may be asked by interrogatory for his own belief, but I cannot think that the opinion of

a person as to what the deceased man believed, unless that person is shown to be in some such relation that he is bound to have information as to that deceased person's belief—which is certainly not suggested here in the pleadings against these executors—can be information which would in any way tend to dispose fairly of the cause or matter, or to save costs. Counsel have admitted very frankly that they have never in the course of their considerable professional experience, known of a person being interrogated about the belief of a person who is deceased, more particularly when the person to be interrogated is merely in this legal position as representing the estate of the deceased. I think these interrogatories are wholly bad, and for these reasons I agree with my Lord that this appeal must be allowed.

SCOTT, L.J. : I agree. Interrogatories 13 and 15 stand together and raise the important question of whether an interrogatory asking a question of pure expert opinion ought properly to be administered to a party when that party can only answer it by consulting experts in advance. In my view an answer of that kind is objectionable on two grounds : first, that it can be of no real assistance to the court, and secondly, that it is unfair to put upon a party the obligation of answering on a purely expert matter at a stage, it may be, considerably before the trial. He is entitled to wait and to form his own judgment about it, in so far as his own judgment is relevant, until the case is ready for trial. The main point is that it is not his judgment on the expert question, but the ultimate judgment of the court, which is important. In my view interrogatories of that kind ought *prima facie* not to be allowed. Interrogatories 10 and 16 in effect ask this question : Did the deceased man who sold the goods believe that the expert descriptions of them in the catalogue were well founded or not ? This is not a question which, in my view, ought to be addressed to the executors, and is a question upon which no direct information can possibly be available—or at any rate, if direct information is available, it will have to be proved in a totally different way at the trial. These interrogatories are to a large extent open to the same objection as the direct questions of an expert character, to which I have already referred, contained in interrogatories 13 and 15. As regards interrogatory 3, I agree with what my learned brothers have said.

Appeal allowed, with costs of both hearings.

Solicitors : Forsythe, Kerman & Phillips (for the appellants); Cardew, Smith & Ross (for the respondent).

[Reported by DEREK H. KITCHIN, Esq., Barrister-at-Law.]

Re ALFRED PRIESTMAN & CO. (1929), LTD.

[CHANCERY DIVISION (Bennett, J.), July 13, 20, 1936.]

*Companies—Liquidation—Application to court to determine any question—
Debenture holder—Creditor—Companies Act, 1929 (c. 23), s. 252.*

The holder of a debenture issued by a company in 1930, and which was in voluntary liquidation under an extraordinary resolution passed on Dec. 23, 1935, made an application to the court under the Companies Act, 1929, s. 252, for a declaration that upon the true construction of his debenture the company had charged with repayment to the debenture holder of the sum thereby secured all stock as therein defined, which was in the possession of the company on Dec. 23, 1935, the date of the appointment by the debenture holder of a receiver and manager of the property thereby charged and all the machinery and loose plant which was at that date the property of the company. He further applied for an order that the liquidators should pay to him or to the receiver the proceeds realised by the sale of the said stock, machinery and plant. The debenture, which was dated Aug. 26, 1930, provided, *inter alia*: "The company hereby charges with the said payments by way of floating charge, first, all stock in the possession of the company which has been purchased, acquired or appropriated by the company for the purpose of executing orders obtained by the company for the delivery of piece goods to [the debenture holder] . . . and, secondly, all the machinery and the loose plant of the company." The registrar dismissed the summons upon the ground that the debenture holder was not a creditor within sect. 252. The liquidators contended that the property charged by the debenture was confined to property in the possession of the company on Aug. 26, 1930, the date of the debenture:—

HELD: (i) the debenture holder, although a secured creditor, was a creditor within sect. 252 of the Act of 1929 and was entitled to make the application.

(ii) the property charged by the debenture included all property of the kinds described therein in the possession of the company on Dec. 23, 1935.

EDITORIAL NOTE. A dispute having arisen as to the property comprised in a debenture, the debenture holder applied to the court as a creditor under Companies Act, 1929, s. 252, to have the point determined. The registrar as well as the liquidators seem at once to have doubted whether a secured creditor was within the terms of that section and, the matter being argued, the former decided against his jurisdiction to entertain the application. The court had no difficulty in allowing an appeal from the registrar, and thought it clear that the word "creditor" in the Companies Act, 1929, s. 252, includes a secured creditor.

FOR THE COMPANIES ACT, 1929, s. 252, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 2, p. 940; and AS TO EXTENT OF FLOATING CHARGE OR SECURITY, see HALSBURY, Hailsham Edn., Vol. 5, pp. 480, 481, para. 780; and FOR CASES, see DIGEST, Vol. 10, pp. 744-746, Nos. 4639-4667; and p. 752, No. 4698.]

Case referred to:

- (1) *Re Yorkshire Woolcombers' Asscn., Ltd., Houldsworth v. Yorkshire Woolcombers' Asscn., Ltd.*, [1903] 2 Ch. 284, affd. [1904] A.C. 355; 10 Digest 750, 4690.

MOTION to discharge an order of the registrar made on June 24, 1936, dismissing an application by John Crook, made under the Companies Act, 1929, s. 252. The facts are set out in the judgment.

Cyril Radcliffe, K.C., and G. O. Slade for the applicant.

J. B. Lindon for the respondents.

BENNETT, J. : This is a motion by John Crook to discharge an order made by the learned registrar on June 24 of this year. The order made by the learned registrar was one by which he dismissed with costs Mr. Crook's application, Mr. Crook's application being one which was made by him under the Companies Act, 1929, s. 252, a section which is in these terms :

(1) The liquidator or any contributory or creditor may apply to the court to determine any question arising in the winding up of a company, or to exercise, as respects the enforcing of calls, or any other matter, all or any of the powers which the court might exercise if the company were being wound up by the court. (2) The court, if satisfied that the determination of the question or the required exercise of power will be just and beneficial, may accede wholly or partially to the application on such terms and conditions as it thinks fit, or may make such other order on the application as it thinks just.

Alfred Priestman & Co. (1929), Ltd., is in voluntary liquidation by an extraordinary resolution passed by the company on Dec. 23, 1935. Mr. Crook lent the company money upon the security of a debenture, and his application was :

(1) for a declaration that upon the true construction of a debenture dated Aug. 26, 1930, the company has thereby charged with repayment to the applicant of the sum thereby secured (i) all stock as therein defined which was in the possession of the company on Dec. 23, 1935, being the date of the appointment by the applicant under the terms of the said debenture of a receiver and manager of the property thereby charged and which had on or before the said date been purchased, acquired or appropriated by the company for the purpose of executing orders obtained by the company for the delivery of piece goods to the applicant and (ii) all the machinery and loose plant which was upon the said date the property of the company.

(2) An order that the respondents do pay over to the applicant or alternatively to the receiver and manager hereinbefore mentioned the proceeds realised by the sale of the said stock, machinery and loose plant.

(3) An order that the applicant may have such further or other relief as to this honourable court may seem meet.

The matter was disposed of by the learned registrar and the summons dismissed upon the ground that the applicant was not a creditor within the meaning of sect. 252, the suggestion being that a creditor who had a mortgage or security or a charge was not a creditor within the meaning of that section. I see no reason why I should read into the section a word which is not there. The applicant is a creditor, although he happens to be a secured creditor, and in my judgment there is no ground upon which you can properly hold that the section is only available for a creditor who has no security or who is not a mortgagee. I hold that the applicant in this case was a creditor within the meaning of sect. 252, and was entitled to make the application he did make.

Then the next question is, what is the meaning of the debenture that the applicant holds? It is dated Aug. 26, 1930. There are only three clauses which are material, and I will read them:

(i) Alfred Priestman & Co. (1929), Ltd. (hereinafter called "the company") will on demand in writing pay to John Crook of 4 Percy Street Huddersfield in the County of York or other the registered holder thereof (hereinafter called "the debenture holder") the sum of £10,000. (ii) The company will pay to the debenture holder interest on the principal moneys hereby secured at the rate of £5 per cent. per annum from the date of the appointment of a receiver and manager of the property hereby charged under the power hereinafter contained. (iii) The company as beneficial owner hereby charges with the said payments by way of floating charge, first, all stock in the possession of the company which has been purchased, acquired or appropriated by the company for the purpose of executing orders obtained by the company for the delivery of piece goods to the said John Crook including in that designation stock in the form of finished pieces or in process including yarns purchased or acquired or appropriated by the company for the execution of such orders as aforesaid and secondly all the machinery and the loose plant of the company.

The point made by the respondents to the summons is this. It is said that the property charged is confined to property in the possession of the company on the date when the debenture was issued, Aug. 26, 1930, and does not extend to property of the kind described in clause (iii) acquired by the company after that date. In my judgment there is no foundation for that contention. The company is described as charging with the payments which had to be made the property described by way of floating security. To take one sentence from the judgment of COZENS-HARDY, L.J., in the case of *Houldsworth v. Yorkshire Woolcombers' Association, Ltd.* (1), dealing with what a floating charge is, COZENS-HARDY, L.J., said at p. 298:

My view is that the floating charge need not be on the whole undertaking nor on the whole property of the company. It must, I think, embrace both present and future property.

That is sufficient ground, I think, for me to say that property of the description charged by the debenture includes not only property of that description on Aug. 26, 1930, but all property of that description on the relevant date, Dec. 23, 1935.

Registrar's order discharged. Declaration in the terms of the prayer in the summons. Costs payable by the respondents with liberty to reimburse themselves out of the assets of the company.

Solicitors: *Maxwell, Batley & Co.*, agents for *Simpson, Curtis & Burrill*, Leeds (for the applicant); *Robbins, Olivey & Lake*, agents for *Sampson, Horner & Co.*, Bradford (for the respondents).

[Reported by REGINALD TOWNSEND, ESQ., Barrister-at-Law.]

STOCKWELL v. SOUTHGATE CORPORATION.

[KING'S BENCH DIVISION (Porter, J.), May 6, 7, July 24, 1936.]

Highways—Repair—Liability of local authority—Substitution of new highway—New highway not viewed by justices—Declaration in High Court or procedure before justices—Discretion of court—Estoppel—Highways Act, 1835 (c. 50), s. 91.

A part of an old footpath, repairable by the inhabitants at large, was diverted and the substituted highway was a road 60 feet wide. All the usual steps were taken under the Highways Act, 1835, in respect of the diversion, except that at no time did the justices view the new highway in accordance with sect. 91 of the Act. From 1911 the old highway had been built over and the new highway continuously used. Two frontagers claimed a declaration that the new highway was repairable by the inhabitants at large:—

HELD: (i) the proper proceedings to test this question were proceedings in a court of summary jurisdiction under the Private Streets Works Act, 1892.

(ii) this was not a proper case for the court in the exercise of its discretion to make a declaration.

(iii) the Attorney-General was not a necessary party to the action.

(iv) the substituted highway would not be repairable by the inhabitants at large until the Highways Act, 1835, s. 91, had been complied with.

(v) it could not be assumed in a recent case that all formalities had been complied with and the local authority was not estopped from asserting such non-compliance.

[EDITORIAL NOTE.] Of the points decided in this case, it would appear that all except the refusal of the declaration are strictly not necessary to the decision of the case, and therefore *obiter*. The necessity that in the case of a substitution of a new highway, all the formalities under the Highways Act, 1835, shall be completed before the way becomes repairable by the inhabitants at large is perhaps the most interesting of these subsidiary points. In connection with this matter, his Lordship refused to apply the maxim *omnia præsumuntur rite esse acta* in a case where the proceedings were as recent as 1911, and the Act requires a certificate enrolled amongst the records of a court of quarter sessions, and he further held that although the old way had been built over and the new way continuously used, there was no estoppel upon the local authority and it was at liberty to set up the non-fulfilment of the statutory duty.

AS TO DIVERSION OF HIGHWAYS, see HALSBURY, Hailsham Edn., Vol. 16, pp. 264-273, paras. 323-335; and FOR CASES, see DIGEST, Vol. 26, pp. 476-487, Nos. 1889-1991. AS TO DECLARATORY JUDGMENTS, see HALSBURY, Hailsham Edn., Vol. 19, pp. 215, 216, para. 512; and FOR CASES, see DIGEST, Vol. 30, pp. 142-153, Nos. 183-262.]

Cases referred to:

- (1) *Kingston-upon-Thames Corpn. v. Baverstock* (1909), 73 J.P. 378; 26 Digest 486, 1988.
- (2) *Barraclough v. Brown*, [1897] A.C. 615; 42 Digest 748, 1726.
- (3) *Guaranty Trust Co. of New York v. Hannay & Co.*, [1915] 2 K.B. 536; 30 Digest 147, 219.
- (4) *Simceton v. A.-G.*, [1920] 1 Ch. 85; 30 Digest 144, 198.
- (5) *Ruislip-Northwood Urban District Council v. Lee* (1931), 95 J.P. 164; Digest Supp.
- (6) *Thornhill v. Weeks*, [1913] 1 Ch. 438; 30 Digest 150, 236.

- (7) *Barwick v. South Eastern & Chatham Ry. Cos.*, [1921] 1 K.B. 187 ; 30 Digest 146, 214.
- (8) *Porthcawl Urban District Council v. Brogden*, [1917] 1 Ch. 534 ; 26 Digest 547, 2446.
- (9) *R. v. Minister of Health, Ex p. Aldridge*, [1925] 2 K.B. 363 ; 26 Digest 545, 2433.
- (10) *Faulkner v. Hythe Corp.*, [1927] 1 K.B. 532 ; Digest Supp.
- (11) *Leigh Urban District Council v. King*, [1901] 1 K.B. 747 ; 26 Digest 487, 1991.
- (12) *Williams v. Eytton* (1859), 4 H. & N. 357 ; 26 Digest 486, 1990.
- (13) *Cababé v. Walton-on-Thames Urban Council*, [1914] A.C. 102 ; 26 Digest 362, 876.
- (14) *Sunderland Corp. v. Priestman*, [1927] 2 Ch. 107 ; Digest Supp.

ACTION for a declaration as to liability to repair a highway. The plaintiffs claimed a declaration that Broad Walk, in the Borough of Southgate, is a highway repairable by the inhabitants at large, by reason of its being a highway substituted for a highway admittedly so repairable. The defendants denied that the roadway or any portion thereof is repairable by the inhabitants at large, and alleged that there never had been a substitution of the new road for the old road. The plaintiffs claimed that the defendants were estopped from setting up such a plea because the new road had been dedicated by the public authority as a substitute for the old road. The defendants also contended that this action was not maintainable in the High Court, as a remedy in a court of summary jurisdiction was provided by statute, and if the action was so maintainable, it was not a case in which a declaratory judgment ought to be made. The facts and arguments are fully set out in the judgment.

R. M. Montgomery, K.C., Trustram Eve, K.C., and A. Capewell for the plaintiffs.

Roland Burrows, K.C., Walter Frampton and D. M. Wilson for the defendants.

PORTER, J. : In this action Mr. Stockwell claims a declaration against the Mayor, Aldermen and Burgesses of the Borough of Southgate, the declaration asked for being that a certain road or a portion of a road is a highway repairable by the inhabitants at large.

The action arises in this way. The plaintiff is an owner and frontager on a road which is now known as Broad Walk, Southgate, but which was formerly known as Dog and Duck Lane. The defendants are a local body having the duties of repairing public highways. The dispute arises under the Private Street Works Act in a claim in which the defendants maintain that they are entitled to call upon the plaintiff, among other frontagers upon that road, to put the road into repair. The actual dispute is that the frontager, the plaintiff, claims that a portion of that road is repairable by the inhabitants at large, whereas the defendants claim that, whether it be a public road or not, that portion

of it is not repairable by the inhabitants at large. Now, so far as the original pathway is concerned, Dog and Duck Lane, there is no dispute about that; that pathway is admitted to have been repairable by the inhabitants at large. The actual original pathway ran from Bourne Hill to Winchmore Hill, and at the time before this dispute arose was a pathway running through a wood. It was then some seven or eight feet wide and was not used or fit for use as a carriage way. About the year 1910 or 1911 the Urban District Council of Southgate determined to purchase part of the estate through which the road ran and to enter into a contract with the then owners of that estate under which the owners should lay out the estate in a particular way. For the purpose of the estate being laid out in that particular way, the original footpath was to be turned into a roadway: the roadway was to include the footway, but for a certain portion of its length the original footpath was to be diverted and the road to run in another direction. As I understand it, the dispute arises with regard to the diverted portion; with regard to the other portion, as I understand it (the parties will tell me if I am wrong) the admission is made on behalf of the Borough of Southgate and is agreed by the frontager, so far as the frontagers are concerned, that the only portion of the road which is a highway repairable by the inhabitants at large is the old footpath. So far as that is concerned, the Borough of Southgate does not claim to compel that portion of the road to be made up by the frontagers, and the frontagers accept that they are to be compelled to make up the portions of the road other than the original footpath. The real dispute arises with regard to the diverted road.

The matter first took shape by an agreement entered into on Sept. 5, 1910, between the then owner and, I think his trustees, and the Southgate Urban District Council. I need not refer to the whole of the agreement, but it begins by providing that the vendors agree to sell and the council to purchase a certain portion of the estate. Then it provides in clause 24 that the vendors their heirs, executors, and so on, were to lay out, form and make fit for vehicular and other traffic certain roads. The only one to which I need refer is the one marked E to F, which is the road in question. It is the whole of the road in question and not merely the diverted part. There is a provision that that is to be done within nine months, and there are provisions with regard to sewerage and surface water drains. There are other provisions with regard to the making up of the road, but it adds that:

The council shall as soon as practicable at the expense of the vendors their heirs executors administrators or assigns which expense it is hereby agreed shall not exceed £50 altogether procure the public footpath from Bourne Hill to The Green, Winchmore Hill, marked with a dotted line on the said plan to be diverted into the site of the said road marked E to F [that is the footpath in question] on the said

plan where such road is not laid out on the site of such public footpath and if the council shall not procure such diversion within three months after the date of the conveyance to the council the vendors shall be at liberty to so lay out the said road that the present footpath shall be on the site of such road along its whole length and to alter and straighten any other proposed roads affected by the aforesaid alteration in the site of the proposed road marked E to F.

Then by clause 25 the road marked E to F was to be laid out, formed and made fit for vehicular and other traffic within nine months to a width of 60 feet. Then there is a provision with regard to the time in which the vendors shall develop the land abutting on the road. Under that agreement application was made by the local council for the diversion of the footpath, and the ordinary steps were adopted; the footpath was viewed and the proper steps taken until finally an application was made for the council on Jan. 7, 1911. After reciting that the certificate with regard to the steps necessary to be taken before a road can be diverted had been read by the clerk the order goes on;

It is ordered that the said certificate together with the said proofs and plan as well as the consent in writing of the owners of the land through which the new highway is proposed to be made be enrolled amongst the records of this court and it is further ordered and this court doth adjudge that a certain highway in the parish of Southgate leading from Bourne Hill (formerly called Dog and Duck Lane) to The Green, Winchmore Hill, commencing at a point 946 feet [specifying the exact position] so proposed to be turned diverted and stopped up, be turned and stopped up as in the said certificate of the said justices and in the plan attached thereto is mentioned and described . . . the said new highway to be made in lieu of the before described highway having been first completed and put into good condition and repair and so certified by two justices of the peace upon view thereof.

That order was duly enrolled, and the steps that took place after that appear to have been this. There was a supplementary agreement, but I do not think it is very material, except that under it certain hard core had to be put in the road for the purpose of making foundations and certain sewers had to be provided. The history of the matter was this, that according to the arrangement made between the parties the old pathway was stopped up between the spots where the diversions had taken place. The new road was left open to the public, save to this extent that there appears to have been perhaps up to 1927 certain barriers placed across the new road; those barriers appear at one time to have been at each end of the new road, but the evidence I accept is that the northern barrier was afterwards moved to about half-way along the road, and eventually those barriers disappeared altogether. The old road being stopped up and the new road being left in use, certain houses were built on the site alongside the new road. Those houses and the gardens were made in accordance with plans submitted to the defendants, and the gardens go over in the place where the diversion took place; the gardens of a number of new houses are constructed over the site of

the old footpath and in two cases the houses either touch or in fact encroach upon the old footpath. The only other fact which one has to remember is this, that, in fact, apparently no action was taken by the council or anyone else to see that two justices did inspect the new road or see that it was put into proper order. That, of course, becomes important, having regard to the provision of the diversion order, which says :

the said new highway to be made in lieu of the before described highway having been first completed and put into good condition and repair and so certified by two justices of the peace upon view thereof.

One ought, I think, further to state this fact, that, of course, under the Act providing for the diversion of highways the diversion may take place either because the road is shorter or is more commodious. In this case, I do not think it is claimed that the new road is shorter, but, at any rate, it is claimed that it is more commodious ; and it is more commodious, and so stated to be, for this reason, that whereas in the diverted part the old footpath was merely a footpath, the new highway will be a highway enabling horses, carts and vehicular traffic to go over it instead of merely foot passengers being able to make use of it. I say that for this reason, because although I do not think there is any dispute about it, the one matter which has to be considered is that, suppose the local authority are obliged to repair the diverted highway, a question may arise as to how much of the diverted highway they have to repair. I gather it is common ground that they would have to repair the whole for this reason, that the whole of the new highway takes the place of the old diverted highway. When I say that, I want to qualify my observations with regard to it to this extent : I do not think it follows necessarily that because a new highway is substituted for an old highway, the new highway being of greater width than the old, the inhabitants at large are obliged to repair the whole of that new highway. But in a case where the substitution is of the whole, a new highway for the old and smaller highway, then they have to do so, and in this case one of the reasons why the new highway is to be substituted for the old is because it is more commodious and the fact that it is wider. Therefore, in my view, it is a substitution of the whole of the new highway in its complete breadth for the narrower old highway. I think the case dealing with the matter is the case of *Kingston-upon-Thames Corp'n. v. Baverstock* (1). With those qualifications which I have made with regard to the repair of the substituted road for the old road, I accept the view that the inhabitants at large, if they are liable to repair at all, are liable to repair the whole of the new road.

That brings one to the matter of the dispute between the parties. In either this or last year the highway authority were disposed to have the road made up. As I gather, no formal step was taken telling the

frontagers that the highway authority intended to make up the road and to call upon them to bear their portion of the expense. To that the frontagers objected on the ground that the diverted portion was a highway repairable by the inhabitants at large, and that therefore they could not be called upon to do the repairs, but the repairs must be done by the local authority. The dispute having taken that form, an action was brought on behalf of two of the frontagers, Mr. Stockwell and Mr. Voller, and they asked for a declaration that the whole of the diverted road is a highway repairable by the inhabitants at large, and that a portion of the old road, such portion as constituted the old pathway, is also repairable by the inhabitants at large. The defendants deny that and claim, among other things, that there never had been a substitution of the new road for the old road, because the new road had never been viewed by two justices and certified by them to be in proper order. The plaintiffs claim on their behalf that the defendants are estopped from so saying, or that I ought to presume that the proper steps had been taken and that the new road had been substituted for the old road, or, to put it in another way, that the new road had been dedicated by the public authority as a substitute for the old road.

The first point which is raised by Mr. Burrows with regard to the action so framed is that it is not open to this court to consider the question at all, that there is provision made in the Private Street Works Act, by which the proper steps are that formal action should be taken by the authority for the making up of the new road and that, the expense being thereupon apportioned, if there was any dispute about it the matter should go to the justices and the justices should determine whether this was a highway repairable by the inhabitants at large or was not. I will come to the sections later. Therefore, said Mr. Burrows, this court ought not to and cannot grant a declaration. Secondly, he says even if the court has power to make a declaration it ought not to make it, because it is undesirable that it should interfere with the rights of the justices, and that there is no necessity for it. Thirdly, he says that the road is not a highway repairable by the inhabitants at large; and, fourthly, that there is no estoppel on their part, or presumption that the road has been made into a highway repairable by the inhabitants at large. The law as I conceive it is this. Up till the beginning of 1836 anyone might dedicate a highway, but the inhabitants at large had to repair it. That was found inconvenient, and in 1835, under the Highways Act of that date, there was a provision that new highways are not necessarily to be repairable by the inhabitants at large, but only if certain steps are taken. The provision with regard to stopping up and diverting highways is contained in the same Act of Parliament and begins at sect. 84. That contains the various steps that have to be taken before a road can be stopped with the consent of the justices in

quarter sessions. I do not think I need read sect. 84. Sect. 85 is the section which states that the certificate is to state the number of yards or feet the road is nearer, if it is nearer, or if more commodious, the reason why it is so. Sect. 88 provides for an appeal to quarter sessions in case it is thought that anyone is aggrieved. Sect. 91, after providing that if an appeal is not made the justices shall make an order for diverting a highway, says :

but no old highway . . . shall be stopped until such new highway shall be completed and put into good condition and repair, and so certified by two justices of the peace upon view thereof ; which certificate shall be returned to the clerk of the peace, and by him enrolled amongst the records of the court of quarter sessions next after such order as aforesaid shall have been made, pursuant to the directions hereinbefore contained.

That, however, deals with the substance of the matter and not with the two preliminary questions with which I propose to deal first, the first preliminary question being : Have I right to deal with the matter at all ? Before I deal with that I think I ought to read the sections, or refer to the sections in the Private Street Works Act, which deal with the matter. Sect. 6 deals with the right of the authority to take steps to have the road metalled, paved and so forth, and notifying the frontagers. Sect. 7 says :

During the said month any owner of any premises shown in a provisional apportionment as liable to be charged with any part of the expenses of executing the works may, by written notice served on the urban authority, object to the proposals of the urban authority on any of the following grounds.

The only two which are material are (a) and (b) :

(a) That an alleged street or part of a street is not or does not form part of a street within the meaning of this Act ; (b) That a street or part of a street is (in whole or in part) a highway repairable by the inhabitants at large.

Then sect. 8, of which I need only read subsect. (2) :

No objection which could be made under this Act shall be otherwise made or allowed in any court proceeding or manner whatsoever.

I myself have no doubt—I am not sure that it is a contentious matter—that once the local authority have taken the steps which are provided for in sect. 6, I should have no authority to deal with the matter, but in this particular case that stage has not been reached. Perhaps I might cite as an authority for the proposition I have just laid down the case of *Barraclough v. Brown* (2), which at least goes as far as I have suggested and may go a good deal further ; because one may perhaps state the proposition as it has been put by Mr. Burrows, that if a statute gives a right to recover expenses in a court of summary jurisdiction from a person who is not otherwise liable, there is no right to come to the High Court for a declaration that an applicant has a right to recover. My

own view is that although that is true, there is power in this court to make a declaration in a proper case. The only question is, in my view : Is this a proper case ? The generality with which declarations may now be made is perhaps best seen in the well known case of the *Guaranty Trust Company of New York v. Hannay & Company* (3), which puts the matter probably as broadly as it can be put. At any rate, one has to remember that although that general right exists, it has to be exercised with some discretion. That may perhaps be exemplified by the case of *Smeeton v. A.-G.* (4), where the proposition was laid down that it is not desirable to take matters of revenue from the ordinary court which deals with the matter. As I say, in my view, there is power in my court to make the declaration. It has been made in cases of the kind where normally the magistrates' court would deal with the matter. Perhaps one may cite cases like the *Ruislip-Northwood Urban District Council v. Lee* (5), *Thornhill v. Weeks* (6), and *Barwick v. South Eastern & Chatham Railway Companies* (7). In all those cases a declaration was made, but they were all exceptional cases. Take the first. The authority claimed the right to pull down certain temporary buildings, but it was suggested in answer that a declaration ought not to be made, that the proper course was to proceed before justices ; but in that particular case it was pointed out by MACKINNON, J., that there was power to do something else than to proceed in the magistrates' court, namely, to pull down the buildings, and it was convenient if that remedy existed, that the decision of the court should be obtained before any drastic step was taken. In the same way, in *Barwick v. South Eastern & Chatham Railway Companies* (7), which was a question with regard to rates, that again was an exceptional case, for this reason, that there was no right at the moment to make any charge in respect of rates, but the government were prepared to make a grant in lieu of rates, provided a judgment of the court was obtained. Those were exceptional circumstances, and the step was taken of making a declaration.

In my view, I ought not to make a declaration in this particular case, because I think the matter can adequately be dealt with, and would adequately be dealt with, by the justices, under the Private Street Works Act, 1892, ss. 6, 7 and 8. There are certain disadvantages, in my view, in my making such a declaration. I think it is inconvenient that I should deal with one frontager, when the whole of the frontagers may be affected and when it is right that they should all be represented, if they desire to be represented, before the court which deals with the matter. It is quite true that the matter, if I dealt with it, would only be *res judicata* with regard to two of the frontagers. I can see disadvantages in making a general pronouncement in a case where I have only two of the frontagers before me, whereas all of them, if they desired,

could appeal to the justices, provided they chose to wait until the appropriate steps are taken for apportioning the expense as between the various frontagers. It was put before me that there were disadvantages and that the matter could be more cheaply and effectively disposed of by me in the one case rather than waiting for the matter to be dealt with by the local authority taking the appropriate steps and going to the justices. There is some truth in that, but I am not sure that it lies in the mouths of the frontagers to make it, because if they are right and go before the justices they will not have to pay; if they are wrong, the fact that an apportionment has been made and certain steps have been taken will not add to the expense, because if they are wrong that expense must be incurred in any case. I think in a case of this kind the proper course is to wait until the appropriate steps have been taken and apportionment made, and to decide any disputed matter before the justices. I think there is a certain amount of support for that view in three cases; I am not saying that they are in the least decisive, but I think they indicate the view that it is only in exceptional cases that a declaration in this type of case would be made. Those cases are *Porthcawl Urban District Council v. Brogden* (8), *R. v. Minister of Health, Ex p. Aldridge* (9), and *Faulkner v. Hythe Corpn.* (10).

I ought, I think, as the matter was argued before me, to deal with the other points, but I think that is decisive of the case. I can deal with them shortly. Mr. Burrows also said that the action could not be brought without the attendance of the Attorney-General, and he said that, I think, for this reason. He said this is an action for a declaration which arose with regard to a highway repairable by the inhabitants at large. That is a matter, put in that form, by which all the inhabitants of the road would be affected, because the question whether it is to be a highway or not is one which affects the whole country, and, when that remedy is asked for, the Attorney-General ought to be a party to the action. In a matter where the whole of the country is affected and the particular party who makes the claim is not peculiarly affected, the principle that when that exists the Attorney-General must be made a party is well known and requires no authority; but one has to ask oneself: Are these particular people peculiarly affected or are they not? In my view, they are peculiarly affected. I think the question does not depend upon the exact question whether their property is invaded in any way; I think it depends upon the much broader question: Are they peculiarly affected? One way of asking oneself that question is: What would happen supposing they endeavoured to sell the land? The answer would be that if this is not a highway repairable by the inhabitants at large, but comes under the Private Street Works Act and the obligation imposed by it, the frontagers would get much less in price for their property than they would have got had the road been a highway repairable by the inhab-

itants at large. It is quite true that a man cannot recover merely for damage to himself in a case where the claim is a matter which affects the public at large, as well as himself, but this is not a case where the frontager is affected in his person ; it is a case where the land which he holds is affected. That may be seen by the fact that if he disposes of the land it is the purchaser who is affected. It is only in the right of his land and not in right of himself. For these reasons I hold that the Attorney-General need not be a party to this action.

Now comes the next question, and that is : Has there been a substitution here by which the new road has become substituted for the old and is repairable by the inhabitants at large ? I would gladly hold that it had been substituted, but I do not think I am entitled to do so. It is quite true that the old road has been closed and the new road opened in fact, but the steps that are required under the Highways Act, 1835, s. 91, and the steps, indeed, required by the order, of the justices, have not been complied with ; and there is the last step, namely, that the old road is not to be closed until the new highway has been completed and put in good condition and repair. The order in fact is that the old road be diverted and stopped up :

the said new highway to be made in lieu of the before described highway having been first completed and put into good condition and repair and so certified by two justices of the peace upon view thereof.

That last step, at any rate, is not to be found in any of the records of the court, and until that is done, in my view, there was no right to stop up the old road and the diversion did not take place, in this sense, that although the new road may in a sense have been dedicated to the public, it was not dedicated in such circumstances since 1835, as made it repairable by the inhabitants at large. It is said that, although that may be the position, yet I ought to presume that the proper steps have been taken and consider that the road has been properly dedicated so as to be repairable by the inhabitants at large and properly substituted for the old road. In favour of that proposition I was referred to the case of *Leigh Urban District Council v. King* (11). I would only remark with regard to that decision that the new road there had been substituted since the year 1842, and although there was no evidence of formalities, it was held, in those circumstances, that the justices might determine that the road was repairable by the inhabitants at large. I cannot help feeling that the length of time had a good deal to do with the decision in that case, and also the possibility that at an earlier stage the proper deposit of plans, and so forth, was less accurately and less necessarily done than it is in this century. There is another case which somewhat supports that view, the case of *Williams v. Eyton* (12), but in that case the final step was found to have been taken and it was a preliminary

step which had to be presumed. Moreover, there was no particular place for the deposit of any record under the Act under which they were going in *Williams v. Eyton* (12), and therefore the court might more readily presume that the step had been taken, although the deed or the document was not to be found. Against those authorities one has the authority of *Cababé v. Walton-on-Thames Urban Council* (13), where LORD DUNEDIN was inclined to doubt the authority of *Leigh Urban District Council v. King* (11).

I do not think I ought to assume that the steps indicated and required have been taken in this particular case. Indeed, the evidence, as far as I can see, is rather the contrary except to this extent: it is plain that they had a certain amount of hard core and that certain sewerage was done. On the other hand, there have been constant complaints from an early date that the roads were not in proper repair. It does not appear to me as if they had been ever put into the repair required by the contract made with the local authority, or such as, which is, perhaps, more important, justices would require for allowing the one road to be substituted for the other.

So far as the final proposition is concerned, as to whether there is what I may call, for want of a better word, an estoppel, I do not think a public body can estop themselves, or prevent themselves taking a point where there is a statutory duty to perform by allowing a road to be stopped and treating the other as being a diverted highway in its place. The kind of attitude which I think should be taken up in cases of that kind is to be seen in the case of *Sunderland Corpn. v. Priestman* (14).

Perhaps one might state the general conclusion on the substantial question in this way. The order of the court merely said that the old highway was to be stopped up and diverted and a new highway was to be substituted, provided that the justices viewed the new highway and certified that it was in proper order. They never have certified that it was in proper order, and in my view no diversion has taken place. It may be that the new highway is a highway dedicated, but it has not been dedicated in such circumstances as to make it repairable by the inhabitants at large. As I say, I come to that conclusion with some regret, because the old highway has in fact been stopped up, houses have been built upon it and gardens have been made there. Although I come to that conclusion with regret, I think that is the proper view of the law, and I must come to that conclusion for these reasons: both because I think I ought not to interfere and also because I think no proper steps have been taken to make the new highway a substitute for the old. Therefore I find for the defendants.

Action dismissed with costs, the plaintiffs to have any costs thrown away by reason of the counterclaim. Leave to amend statement of

claim to restrict the declaration to such part of the highway in question as the plaintiffs' premises abut upon.

Solicitors: Woolley, Tyler & Bury (for the plaintiffs); Gordon Harold Taylor, Town Clerk, Southgate (for the defendants).

[Reported by W. J. ALDERMAN, Esq., Barrister-at-Law.]

DORA DOLAN (an infant, suing by her father and next friend Charles Dolan) *v.* DOMINION OF CANADA GENERAL INSURANCE COMPANY.

[LIVERPOOL SUMMER ASSIZES (Atkinson, J.), June 25, 1936.]

Insurance—Accident—Motor car—Third party risks—Retrospective operation of statute—Road Traffic Act, 1934 (c. 50), s. 10.

A pedestrian was knocked down and injured by a motor car on Jan. 12, 1934. The pedestrian recovered damages against the motorist, which damages were not paid. The pedestrian thereupon brought an action against the motorist's insurance company, basing her claim on the Road Traffic Act, 1934, s. 10. The Act of 1934 received the royal assent on July 31, 1934, and sect. 10 came into operation on Jan. 1, 1935:—

HELD: sect. 10 was not retrospective to an accident which occurred before the section came into operation, and the action could not be maintained.

[EDITORIAL NOTE. The recent case of *Croxford v. Universal Insce. Co.* (1) had reference to the Road Traffic Act, 1934, s. 10 (3), whereas the present case is concerned with sect. 10 (2). It is held that the same reasoning applies to both, and the Act is not retrospective in either case.

FOR THE LAW ON THE POINT, see HALSBURY, Hailsham Edn., Vol. 17, pp. 563-565, paras. 913, 914; and FOR THE ROAD TRAFFIC ACT, 1934, s. 10, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 27, pp. 544, 545.]

Case referred to:

- (1) *Croxford v. Universal Insurance Co., Ltd., Norman v. Gresham Fire & Accident Insurance Society, Ltd.*, [1936] 1 All E.R. 151; Digest Supp.

ACTION for money due upon a policy of motor car insurance.

On Jan. 12, 1934, the plaintiff was knocked down and injured by a motor car driven by one Gerard Brennan. The plaintiff in an action in the King's Bench Division Liverpool District Registry recovered £350 damages and costs against Gerard Brennan. These damages and costs were not paid. In the present action the plaintiff claimed that at the time of the accident Gerard Brennan was the holder of a valid policy and certificate of insurance in respect of the motor car issued by the defendants, whereby the defendants agreed to indemnify him in respect of third party risks in accordance with the provisions of the Road Traffic Act, 1930. The plaintiff claimed that the judgment was obtained in respect of a liability such as is required to be covered by a policy under the Road Traffic Act, 1930, s. 36 (1) (b) and a liability covered by the terms of the policy.

The defendants denied that Gerard Brennan was the holder of a policy and certificate issued by them, and alleged alternatively that the policy contained a condition precedent to liability that the motor car should be kept in good and thoroughly sound condition and that Gerard Brennan should use all reasonable precautions calculated to prevent, mitigate or remove risk of accidental injury, loss or damage, which condition the defendants alleged Gerard Brennan had failed to observe, inasmuch as at the time of the accident he was driving the motor car when it had defective or inefficient braking, and claimed accordingly that they were not liable on the policy to indemnify Gerard Brennan in respect of the plaintiff's claim and were entitled to repudiate liability on the policy.

G. J. Lynskey, K.C., and *H. I. Nelson* for the plaintiff.

Frank Soskice and *R. H. Forrest* for the defendants.

Soskice : The Act is not retrospective to a case where the accident was before the Act if the proceedings were started after the Act. This is the result of the *dictum* in *Croxford's* case (1). Here the policy was cancelled from Mar. 9, 1934, and *SCOTT, L.J.*, said in *Croxford's* case (1) that because the policy was there cancelled from July 12, 1934, the Act could not apply. This applies to the present case. Inasmuch as the policy conditions as to keeping the car in good condition were not complied with by the assured and as compliance with the conditions was made a condition precedent to the underwriter's liability, the liability to the third party was not a liability covered by the terms of the policy within the meaning of the Road Traffic Act, 1934, s. 10 (1) and (5).

ATKINSON, J. : In this case the plaintiff is a lady who was knocked down and injured by a motor car on Jan. 12, 1934. The car belonged to, and was being driven by a man named Brennan. She recovered damages against him, which he has not paid ; and she brings this action against his insurance company, basing her claim on the Road Traffic Act, 1934, s. 10.

[His Lordship considered the facts and evidence in detail and found that there was no evidence that the brakes of the motor car were not in a reasonably good and sound condition, and he held that in the circumstances there was no breach of the conditions in the policy.]

But then there comes a second defence, and that is that there can be no claim against them under sect. 10 of the Act of 1934, and I think they are right. It will be realised that there are two points which stand out. The first is that this Act received the royal assent, I think, on July 31, 1934, and came into operation on Jan. 1, 1935 ; that this accident happened in Jan., 1934, and that the policy had been quite properly terminated—when I say “properly” I mean within the terms of the policy—by Mar. 9. In other words, that that policy had ceased to exist

for some months before the Act received the royal assent, and for ten months before the Act came into operation. At first sight anybody must feel, I should imagine, that it would be a peculiar thing that an Act which became operative on Jan. 1 could seize hold of a policy which had already expired for some ten months, and give it the legal effect contended for by the plaintiff, and I think it would need very clear language in any Act of Parliament to bring about such a result. That is one ground upon which I should find on this point in favour of the defendants.

But there is sect. 10 of the Act, which gives the injured person a direct right against the insurance company. The 1930 Act had only given that right in case of the insolvency of the insured. The plaintiff may still be entitled to try and obtain that right if she would be able to make Brennan a bankrupt, and if he does not pay, she may then be in a position to claim through the bankruptcy against the insurance company. But that is not the case I am dealing with. She is claiming under sect. 10. That section says :

(1) If, after a certificate of insurance has been delivered under sect. 36 (5) of the principal Act to the person by whom a policy has been effected, judgment in respect of any such liability as is required to be covered by a policy under sect. 36 (1) (b) of the principal Act (being a liability covered by the terms of the policy) is obtained against any person insured by the policy, then, notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled, the policy, the insurer shall, subject to the provisions of this section, pay to the persons entitled to the benefit of the judgment any sum payable thereunder in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments.

But then comes subsect. (2) of that section, which gives the insurance company certain privileges or rights, which apprehend this *prima facie* liability. It says that :

No sum shall be payable by an insurer under the foregoing provisions of this section—

(a) In respect of any judgment, unless before or within seven days after the commencement of the proceedings in which the judgment was given, the insurer had notice of the bringing of the proceedings ; or

(b) In respect of any judgment, so long as execution thereon is stayed pending an appeal ; or

(c) In connection with any liability, if before the happening of the event which was the cause of the death or bodily injury giving rise to the liability, the policy was cancelled by mutual consent or by virtue of any provision contained therein, and either—(i) before the happening of the said event the certificate was surrendered to the insurer, or the person to whom the certificate was delivered made a statutory declaration stating that the certificate had been lost or destroyed, or (ii) after the happening of the said event, but before the expiration of a period of fourteen days from the taking effect of the cancellation of the policy, the certificate was surrendered to the insurer, or the person to whom the certificate was delivered made such a statutory declaration as aforesaid.

I need not read all the sections, but there are two rights which are given to the insurance company. It seems to me, therefore, that if they had cancelled the policy before the accident, and had either before or within fourteen days of the expiration of the policy, recovered the certificate, then they are not liable to the injured person. It seems to me that the defendants are in a position to say: "This sect. 10 does give an insurance company a way out, which they are entitled to avail themselves of, and we never had the advantage of that possibility of utilising the way out. At the time of the accident the law was that we were under no liability except in the case of insolvency, and even then any defence would be open to us—we were under no liability to any third party." But now, having regard to the state of the law, as we now know it, it is open to an insurance company to keep a very close watch upon insured vehicles. They can—no doubt they have now, but at any rate it would be open to them to have inspectors to go round and keep an eye upon insured vehicles, especially if they are old ones like this, so 'hat, if they found that a vehicle was not being properly looked after they could at any moment say: "We will terminate this policy. We have power to do it because you have broken this condition," and so put an end to the risk which rested upon them, and put an end to it once they had recovered the certificate. If they had known that they had these rights at the time, no one could say that they would not have exercised them in this case. An insurance company having that right, this is a case in which, I should imagine, they would keep a very close eye upon a vehicle if it was worth only £15, and, if the present law had been enacted at that time, no one can say that they would not have exercised their rights in order to escape their liability. That being so, it seems to me to be quite impossible to claim that this Act has a retrospective effect—an effect which would put them in a far worse position at that time than it is now with regard to future accidents. And, even apart from authority, for those two reasons I should be quite satisfied that the Act could not have this retrospective effect which is contended for on behalf of the plaintiff.

A similar question to this one was recently before the Court of Appeal in the case of *Croxford v. Universal Insurance Co., Ltd.*, *Norman v. Gresham Fire & Accident Insurance Society, Ltd.* (1). I am not going to spend time in going through that case. It had reference to subsect. (3), which is an analogous matter. The subsection is as follows:

No sum shall be payable by an insurer under the foregoing provisions of this section, if, in an action commenced before, or within three months after, the commencement of the proceedings in which the judgment was given, he has obtained a declaration that, apart from any provision contained in the policy, he is entitled to avoid it on the ground that it was obtained by the non-disclosure of a material fact, or by a representation of fact which was false in some material particular, or, if he has avoided the policy on that ground, that he was entitled so to do apart from any provision contained in it.

In other words, subsect. (3) relates to defences which are open to them, or steps they might take to avoid liability. In *Croxford's* case (1) the question was whether the Act applied to an accident which had happened before Jan. 1, 1935, where they were entitled to cancel the policy on the ground of concealment of material facts.

A third point which was taken by the insurance company was that at the time of this accident, and at the time of the proceedings, the 1934 Act was not in operation, "and therefore, of course, we never sought to protect ourselves by the provisions of an Act which is not yet law, or which was not yet in operation," and the court held, in view of that, that it was impossible to say that this section had a retrospective effect. So far as subsect. (3) is concerned, SCOTT, L.J., dealt with that subsection, and with subsect. (2) as well, and he said this, at p. 167 :

Therefore, I am satisfied to base my judgment upon the view that the provisions of subsect. (1) have no operation in regard to any case until such a date after Jan. 1, 1935, when sect. 10 was brought into operation, as shall leave time subsequent to Jan. 1, for all the conditions contained in subsects. (2) and (3) to be made effective in accordance with the detailed provisions as to time contained therein.

I can see no reason why a decision as to subsect. (3) is not applicable to subsect. (2). The principle is just the same. At any rate there is a very strong expression of opinion by SCOTT, L.J., that subsect. (2) is in the same position as subsect. (3), and the learned LORD JUSTICE also laid great stress upon the point which I have indicated here : that the insurance company had repudiated the policy, and had demanded the certificate back before the royal assent had been given to the 1934 Act, and that, in the subsequent proceedings, the man was uninsured. That is precisely the position here, because from July, when the royal assent was given, the policy had ceased to exist, and the view was there expressed as to the impossibility of carrying an Act like this back to operate upon a policy which had ceased to exist for ten months before the Act came into operation. And therefore for those reasons I find that that section is not open to the plaintiff ; and that, as regards sect. 10 (2), it has no retrospective effect—at any rate, not sufficiently retrospective to help the plaintiff in this case. Therefore there must be judgment for the defendants.

Solicitors : *G. J. Lynskey & Sons*, Liverpool (for the plaintiff) ; *Frederick W. Pope* (for the defendants).

[Reported by M. D. CHORLTON, Barrister-at-Law.]

VICTORIA SPINNING COMPANY (ROCHDALE), LTD.
v. MATTHEWS.

[HOUSE OF LORDS (Lord Atkin, Lord Russell of Killowen and Lord Macmillan), **June 26, 29, July 22, 1936.**]

Workmen's Compensation—Adjusting defective machinery in motion in contravention of regulation—Dangerous act for purposes of employers' trade or business—Whether accident arising out of and in course of employment—Workmen's Compensation Act, 1925 (c. 84), s. 1 (1), (2).

A cotton machine was fitted with a locking device which prevented the bars of the machine being cleaned or adjusted while it was in motion. A workman, while operating the machine, noticed that it was defective, and, finding that the locking device was broken, he attempted to clean or adjust the bars when the machine was running, contrary to the orders of his employers. In so doing he slipped and sustained serious and permanent injuries through his left hand coming into contact with the revolving knives. He claimed compensation on the ground that the accident arose out of and in the course of the employment, or should be deemed to have so arisen by virtue of sect. 1 (2) of the Workmen's Compensation Act, 1925:—

HELD: (i) as the prohibited act of cleaning the bars while the machine was in motion resulted in serious and permanent disablement of the workman, and was done by him for the purposes of and in connection with his employers' trade or business, the accident must be deemed to arise out of and in the course of the employment; and the employers were therefore liable to pay compensation.

(ii) the defence of added peril, based on the allegation that the contravention of the employers' regulation by the workman added a peril to his employment, could no longer, since the decision in *Thomas v. Ocean Coal Co., Ltd.* (1), deprive the workman of compensation.

[EDITORIAL NOTE.] Employers for the protection of themselves and their employees make numerous regulations intended to prevent the employees from doing their work in a dangerous way. The question then arises whether these regulations have the effect of restricting the sphere of the employment, so that an act done in breach of such regulations is outside the sphere of the employment. The argument here does not go quite as far as that. The suggestion is that if the act done in breach of the regulation is of so hazardous and reckless a nature that it adds a new peril to the operation, then it is outside the sphere of the employment and is not saved by the provisions of the Workmen's Compensation Act, 1925, s. 1 (2). This suggestion, however, the House refused to accede to, and their Lordships thought they were bound by the decision in *Thomas v. Ocean Coal Co.* (1) to say that no such contention was now available to the employer.

AS TO ACTS DEEMED TO ARISE OUT OF THE EMPLOYMENT, see HALSBURY SUPP., Vol. 20, para. 364; and FOR CASES, see DIGEST, Vol. 34, pp. 297-309, Nos. 2471-2545.]

Cases referred to:

- (1) *Thomas v. Ocean Coal Co., Ltd.*, [1933] A.C. 100; 25 B.W.C.C. 436; Digest Supp.
- (2) *Wilsons & Clyde Coal Co. v. M'Ferrin, Kerr or M'Aulay v. Dunlop (James) & Co.*, [1926] A.C. 377; 19 B.W.C.C. 1; 34 Digest 301, 2499.

APPEAL from an order of the Court of Appeal (SLESSER and ROMER, L.JJ., and SWIFT, J.) reversing an award made by the county court judge in favour of the appellants in an arbitration under the Workmen's

Compensation Acts, 1925-31, and ordering that an award be entered in favour of the respondent for compensation at the rate of 24s. 8d. per week.

William Matthews was a scutcher employed to look after three scutching machines in a cotton factory and it was part of his duty to see that they operated properly. One of the machines had a glass inspection cover and there was a locking device which, if in order, prevented anyone attending to the machine whilst it was in motion. On the day of the accident, Dec. 11, 1934, it was not in order, and it was admitted on behalf of the workman that it was his duty to report the fact. Matthews saw that the cotton was not being fed properly and, taking advantage of the defect in the locking device, proceeded to adjust the machine while it was still in motion. In doing so he slipped and his left hand was caught in the machinery. Three fingers were cut off, and the little finger and thumb broken. He brought a claim for compensation. The county court judge found on the evidence that he had acted in contravention of a prohibition. He then referred to the case of *Thomas v. Ocean Coal Co., Ltd.* (1), and though he found that the workman was doing something for the purposes of his employer's business within sect. 1 (2) of the Act of 1925, he held that the workman was doing something which was so dangerous in itself that it took the workman out of the sphere or scope of his employment so that he could not benefit by that subsection. He made his award in favour of the employers. The Court of Appeal reversed this decision, holding that the fact that the act was a dangerous one did not prevent the application of sect. 1 (2) of the Act of 1925.

F. A. Sellers, K.C., and B. Ormerod for the appellants.

Edgar Dale and Percy Butlin for the respondent.

LORD ATKIN : My Lords, I have had an opportunity of reading the opinion which is about to be delivered by my noble and learned friend, LORD RUSSELL OF KILLOWEN. I entirely agree with it and have nothing to add.

LORD RUSSELL OF KILLOWEN : My Lords, in this case it would appear from the facts that when the workman set about cleaning the bars (themselves stationary) of his machine, he was doing his proper job ; but since the machine was still in motion at the time, he was, while doing his proper job, acting in contravention of a prohibition against adjusting or cleaning the bars while the machine was in motion. There does not appear to have existed any written prohibition ; but the machine was purposely so constructed as to make it impossible to adjust or clean the bars without first stopping the machine. That the workman was able to do so on this occasion was due to the fact

that the apparatus was in that respect temporarily out of order. Further, the county court judge has found that had the workman been seen cleaning the bars while the machine was in motion, he would probably have been immediately dismissed, and that he knew he was doing wrong. In these circumstances it seems to me that it may properly be said that in so far as the workman was cleaning the bars while the machine was in motion, he was at the time when the accident happened acting either in contravention of a regulation applicable to his employment, or of an order given by or on behalf of his employer.

The county court judge has found that the accident has resulted in serious or permanent disablement of the workman, and that the act, i.e., the act of cleaning the bars while the machine was in motion, was done by the workman for the purposes of and in connection with his employer's trade or business. Accordingly, all the conditions specified in the Workman's Compensation Act, 1925, s. 1 (2), existed in the present case; and *prima facie* one would expect that as provided by that subsection, the accident must be deemed to arise out of and in the course of the workman's employment, and that accordingly the employer would be liable to pay compensation by virtue of sect. 1 (1).

The county court judge, however, has decided otherwise upon the ground, as I read his judgment, that the workman in cleaning the bars while the machine was in motion was doing something outside the scope or sphere of his employment, and—I now quote the learned judge's words—"That being so, Matthews fails to bring himself within sect. 1 (1), and subsect. (2) therefore cannot avail him." He appears to found himself upon the view that certain decisions in your Lordships' House (including the case of *Thomas v. Ocean Coal Co.* (1)) have decided that a workman must bring himself within subsect. (1) before he can avail himself of subsect. (2), and that accordingly if the act which the workman has done has added a peril to the employment, he cannot come within subsect. (1), and therefore subsect. (2) can have no application to this case.

I confess to some surprise at the suggestion that the *Ocean Coal Co.* case (1) had in any way narrowed the operation of subsect. (2) in favour of the workman, though some of the earlier cases may have had that tendency. Speaking for myself, and apart from authority, the words of subsect. (2) taken in their natural and literal sense would appear to be of wide application, and might be paraphrased thus—that every accident which results in the death or serious and permanent disablement of a workman shall be deemed (though it does not do so) to arise out of and in the cause of his employment, even if the workman was acting in contravention of a statutory or other regulation or of an order or without instructions, but in those specially mentioned cases only if such act was done for the purposes of and in connection with his em-

ployer's trade or business. I recognise, however, that this wide interpretation is not open to me, in view of opinions expressed in your Lordships' House in the cases of *Wilsons & Clyde Coal Co. v. M'Ferrin* and *M'Aulay v. James Dunlop and Co.* (2). The different treatment of the cases of the two men M'Ferrin and M'Aulay establishes, I think, the proposition, that if a workman at the time of the accident is doing something which is not his job at all and in doing that job contravenes a regulation or order to which those whose job it is are subject (as distinguished from the case of a workman whose job is subject to a regulation or order which he contravenes while doing his job) he is not within the provisions of subsect. (2), and the employer is not liable to pay compensation. The matter was fully discussed in the *Ocean Coal Co.* case (1), in which the workman there in question was held to be covered by subsect. (2). He was like M'Ferrin; he was doing his job, but in doing it he had acted in contravention of a regulation. He was not like M'Aulay who had arrogated to himself a job which was not his, and in doing it, had broken a regulation.

It was, however, argued before us that if the contravention of the regulation or order adds a peril to the workman's employment, a workman who is doing his own job and whose case otherwise fits in with the provisions of subsect. (2), can be deprived of the benefit of that subsection on the ground of added peril. In support of this contention reliance was placed on some words used by LORD BUCKMASTER in the *Ocean Coal Co.* case (1), at p. 107, in reference to *Wilsons & Clyde Coal Co. v. M'Ferrin* (2). But the effect of what LORD BUCKMASTER there said was, as I understand it, only this, that if the only reason for suggesting that the accident did not arise out of and in the course of the employment was the acting in contravention of a regulation or order, the case would be covered by subsect. (2), provided the act was done for the purposes of and in connection with the employer's trade or business.

Nothing was said either in *Wilsons & Clyde Coal Co. v. M'Ferrin* (2) or in the *Ocean Coal Co.* case (1) which justifies the view, nor is it in my opinion the law, that the employer can by the defence of added peril deprive the workman of the benefit of subsect. (2), where the only peril alleged to be added is that which follows from the contravention referred to in the subsection. So to hold would in effect reduce the operation of the subsection to vanishing point.

I agree with the views expressed by SLESSER, L.J., in the present case, namely, (i) that the arbitrator did not decide this case on the ground that the workman had, quite apart from any question of prohibition, done something hazardous outside the scope of his employment, and (ii) that after the *Ocean Coal Co.* case (1) it is no longer open to the courts to hold that because the "contravention" by the workman added a peril to the employment, the accident did not arise out of and in the course

of the employment, and that consequently subsect. (2) did not apply.

In my opinion this appeal fails, and should be dismissed with costs.

LORD MACMILLAN : My Lords, I concur.

Appeal dismissed with costs.

Solicitors : *Gregory, Rowcliffe & Co.*, agents for *John Taylor & Co.*, Manchester (for the appellants) ; *P. R. Christie*, agent for *J. Bright Clegg*, Rochdale (for the respondent).

[Reported by MICHAEL MARCUS, Esq., Barrister-at-Law.]

WILLIAM H. MULLER & CO.'S ALGEMEENE, ETC. v.
EBBW VALE STEEL, IRON & COAL CO., LTD.

WILLIAM H. MULLER & CO., N.V., ETC. v. EBBW
VALE STEEL, IRON & COAL CO., LTD. (CONSOLIDATED).

[KING'S BENCH DIVISION (BRANSON, J.), **July 13, 14, 15, 1936.**]

Practice—Trial by judge alone—Submission of no case to answer—Whether undertaking not to call further evidence obligatory.

Contracts were entered into for the delivery by the plaintiffs to the defendants of certain monthly quantities of iron ore. The defendants requested the plaintiffs to suspend chartering instructions until further instructions were given. In an action for damages for non-acceptance of the iron ore outstanding for delivery, the plaintiffs alleged that by certain letters the defendants had repudiated the contracts and had refused to give further orders for delivery or to accept delivery of any of the ore. The defendants submitted that there was no evidence of any repudiation by them of their obligations under the contracts, and no evidence, therefore, of breach of contract. The plaintiffs contended that the judge should not deal with this submission except upon the terms that the defendants should undertake not to call any further evidence upon any question of fact. In the event of their submission being wrong, the defendants would have relied upon a clause in the contracts which, they said, relieved them from any obligation to take the undelivered balance of the ore, and for this ground of defence they would have been desirous of calling further evidence :—

HELD : (i) the judge was not bound to deal with the submission only upon the terms that the defendants should undertake not to call any further evidence upon any question of fact.

(ii) it is in the judge's discretion whether he will deal with the submission or wait until he has heard all the evidence on both sides.

(iii) in the present case the submission should be dealt with.

[EDITORIAL NOTE.] It was suggested that by reason of a dictum in *Alexander v. Rayson* (1) a judge of first instance, trying a case without a jury, could not accede to a submission of no case to answer, unless the defendant (or the party having to answer) undertook to call no further evidence. The suggestion was rejected.

AS TO SUBMISSION OF NO CASE, see DIGEST, Practice, pp. 564–566, Nos. 2224–2241.]

Cases referred to :

(1) *Alexander v. Rayson*, [1936] 1 K.B. 169 ; Digest Supp.

(2) *Alex v. Kerridge*, unreported.

CONSOLIDATED ACTIONS for damages for breach of contract. The case is reported solely on the point of practice stated in the judgment.

H. U. Willink, K.C., and *A. E. Beecroft* for the plaintiffs.

A. T. Miller, K.C., and *Valentine Holmes* for the defendants.

BRANSON, J. : This case is in rather a peculiar position. Indeed, I think it has been from the start. It arises out of four contracts entered into by the Ebbw Vale Steel, Iron & Coal Co., Ltd., and Messrs. Wm. H. Muller as sole agents for W. H. Muller & Co.'s Algemeene Minbouw Maatschappij. There were three contracts with one party and one with another company, who are the plaintiffs in a second action which has been consolidated with the first. The action is framed in both cases in exactly the same form, and the plaintiffs allege contracts in writing for delivery of iron ore to the defendants at Newport in certain monthly quantities. It is alleged that by certain named letters the defendants requested the plaintiffs to suspend chartering instructions until further instructions were given. It is pleaded that the plaintiffs were ready and willing to make delivery in pursuance of the contracts, but in pursuance of the requests they forbore to insist upon the defendants taking delivery. Then para. 3 of the points of claim proceeds to allege that by a letter dated Dec. 20, 1929, the defendants refused to give further orders for delivery or to accept delivery of any of the ore. Then they go on to allege that the defendants had failed and refused to give any orders for delivery or to accept any part thereof. The pleadings continue, and it is material to read them as they are pleaded :

By a letter dated July 7, 1930, the plaintiffs gave notice to the defendants of the quantities of ore which were outstanding for delivery to them, but by letters dated July 8 and 11 the defendants refused to accept any deliveries and repudiated liability under all of the contracts then subsisting. Furthermore, by letter dated Feb. 9, the plaintiffs gave to the defendants notice of their losses to Dec. 31, 1930, when the performance of the contract dated July 6, 1929, had also been completed, but the defendants again repudiated any liability in their letter.

Then it alleges that in consequence of those letters the defendants committed breaches of the contract, or, alternatively, repudiated the contract. In argument two more letters were relied upon, though not mentioned in the pleadings. An application was made that if necessary the pleadings should be taken to be amended by the insertion of the letter of Jan. 28, 1935, as another letter by which the defendants repudiated any liability under the contract. So that the claim is a claim which states that there were certain contracts entered into to be performed by instalments and that the defendants first of all asked the plaintiffs to forbear delivery of their instalments, but subsequently repudiated the contract and failed to take any of the instalments then due. That is a case which, if established, would constitute a breach of the contracts, but the defence, as

I have to deal with it at the moment, is that the pleadings have not established that there ever was any repudiation of the contract by the defendants, that there never was any refusal to deliver any instalment which the defendants were called upon by the plaintiffs to accept. It is contended that if that is so, there is no point in going into the other issues that have been raised in the case, because that point is sufficient to decide the case. Then it is said that Mr. Miller, having submitted, at the end of the plaintiffs' case, that this particular point is sufficient to answer the plaintiffs' claim, I ought to decline to deal with it except upon terms that Mr. Miller should be forever precluded from calling any further evidence.

Now, in order to make the position clear with regard to this matter, I think it is right to say that there is a second point raised in the case which is different from the one which I have already stated, for the defendants say that supposing they are wrong in the point which I have already stated, namely, that there is no evidence of any repudiation by them of their obligations under the contract, and no evidence, therefore, of any breach by them of their contract, they would be entitled to say that they were relieved, and had always been relieved up to the date of the writ, from any obligation to take the undelivered balance of this ore by virtue of the last paragraph of the last clause in the contract notes. For the purpose of deciding whether or not they are so relieved the defendants would be, if the points are put, desirous of calling further evidence. I am pressed to say, in view of the decision of the court in the case of *Alexander v. Rayson* (1), and in a former unreported case of *Alex v. Kerridge* (2), that as a judge of first instance to whom a submission such as this is made at the end of the plaintiffs' case, I should not accede to it except upon the terms that the defendants should undertake not to call any further evidence upon any question of fact. Now, with the greatest possible respect for anything which falls from the Court of Appeal, I cannot find in the report of the case of *Alexander v. Rayson* (1) anything more than a statement that the suggested method of procedure is highly inconvenient. Now, once you come to the question of convenience, of course it must be a question which has to be decided according to the particular circumstances of the particular case, and I cannot think, if the Court of Appeal had intended to lay it down as an inflexible rule that a judge of first instance ought not to accede to a submission of no case made at the end of the plaintiffs' case except upon the terms that the defendants should be precluded from calling any further evidence, that their Lordships would not have laid that down in very different language from that which was adopted in the case of *Alexander v. Rayson* (1). It seems to me that it must be a matter for the judge who is to try the case to decide for himself whether, in the particular case before him, and having regard to all the circumstances of it, it is

likely to save the litigants before him expense and time and trouble to deal with the case by way of ruling upon the submission without putting any terms upon counsel upon either side, or whether it is better to say : " In this case I think it would be desirable that before I rule I should hear the whole of the evidence." If it is intended to be laid down as a general rule, it would save judges at first instance considerable trouble if it could be done, but while the matter remains expressed as a matter of convenience I conceive it to be my duty to apply my mind to the question whether in a particular case to act in one way or to act in the other is likely to be of more convenience to the parties whose interests I have in my hands than if I were to take a different view about it. Therefore in the present case I have proposed to rule upon this submission, leaving it completely open for any superior tribunal to decide whether in doing so I was right or wrong, without taking, as I do not take, any undertaking from counsel that he will not call, if he is entitled to call, further evidence in the event of my decision being disturbed by a higher court.

[His Lordship considered the plaintiffs' evidence in detail and held that the case as pleaded had not been established by the evidence called, that upon the evidence there had not been any breach of the contracts by the defendants, and that consequently the action failed and must be dismissed.]

Solicitors : *C. J. Sharpe* (for the plaintiffs) ; *Linklaters & Paines* (for the defendants).

[*Reported by W. J. ALDERMAN, Esq., Barrister-at-Law.*]

GEORGE LEGGE & SON, LTD. v. WENLOCK CORPORATION.

[CHANCERY DIVISION (Crossman, J.), July 15, 16, 17, 21, 22, 23, 24, 27, 28, 31, 1936.]

Sewers and Drains—Natural watercourse—Discharge of sewage—Illegal discharge—Conversion of watercourse into sewer—Public Health Act, 1875, (c. 55), s. 4—Rivers Pollution Prevention Act, 1876 (c. 75), s. 3.

A channel, for the greater part of its length in a covered culvert, ran through the plaintiffs' land. Originally the channel was a natural stream or watercourse, but at various times since 1876 sewage has been discharged into it. It was admitted that for at least 23 years before the pleadings in this action (i.e., from 1909), some 20 houses had been drained into the channel and it was contended that such houses had acquired prescriptive rights of so discharging sewage into it. A further 44 houses had commenced discharging sewage into the channel at times subsequent to 1925. It was contended that the discharge of sewage into what was admittedly a natural stream at the time of the passing of the Rivers Pollution Prevention Act, 1876, being an offence under that Act could not convert the stream or channel into a sewer within the meaning of the Public Health Act, 1875 :—

HELD: the fact that the discharge of sewage into the channel was an offence under the Local Government Act, 1858 (Amendment) Act, 1861, or the Public Health Act, 1875, or the Rivers Pollution Prevention Act, 1876, would not necessarily prevent such channel becoming a sewer within the meaning of the Public Health Act, 1875.

[EDITORIAL NOTE.] The suggestion that the illegal discharge of sewage into a stream cannot convert the stream into a sewer within the Public Health Act, 1875, is here rejected. The suggestion proceeded from an interpolation in argument by CHANNELL, J., in *West Riding of Yorkshire Rivers Board v. Yorkshire Indigo, Scarlet and Colour Dyers* (1), but it is doubtful whether the suggestion has ever been made in quite such wide terms as were necessary in the present case, and it seems to have been thought that in certain circumstances such a stream might become a sewer.

FOR THE LAW ON THE POINT, see HALSBURY, 1st Edn., Vol. 25, *Sewers and Drains*, p. 724, para. 1237, and FOR CASES, see DIGEST, Vol. 41, pp. 7-9, Nos. 45-59.]

Cases referred to :

- (1) *West Riding of Yorkshire Rivers Board v. Yorkshire Indigo, Scarlet & Colour Dyers, Ltd.* (1902), 67 J.P. 80 ; 41 Digest 9, 58.
- (2) *West Riding of Yorkshire Rivers Board v. Reuben Gaunt & Sons, Ltd.* (1902), 67 J.P. 183 ; 41 Digest 9, 57.
- (3) *Airdrie Magistrates v. Lanark County Council, Coatbridge Magistrates v. Lanark County Council*, [1910] A.C. 286 ; 41 Digest 8, 52.
- (4) *Hulley v. Silversprings Bleaching Co.*, [1922] 2 Ch. 268 ; 44 Digest 42, 302.
- (5) *Green v. Matthews & Co.* (1930), 46 T.L.R. 206 ; Digest Supp.
- (6) *Falconar v. South Shields Corpn.* (1895), 11 T.L.R. 223 ; 41 Digest 9, 56.
- (7) *A.-G. v. Lewes Corpn.*, [1911] 2 Ch. 495 ; 41 Digest 9, 55.
- (8) *West Riding of Yorkshire Rivers Board v. Preston & Sons* (1904), 69 J.P. 1 ; 41 Digest 8, 51.
- (9) *St. Matthew, Bethnal Green, Vestry v. London School Board*, [1898] A.C. 190 ; 41 Digest 14, 100.
- (10) *Kershaw v. Taylor*, [1895] 2 Q.B. 471 ; 41 Digest 14, 107.
- (11) *Holland v. Lazarus* (1897), 61 J.P. 262 ; 41 Digest 14, 98.

TRIAL of preliminary question of law under an order by consent under R.S.C. Ord. 34, r. 2.

The case having been opened and some evidence having been given, it was agreed that an order should be made by consent under the above rule for the trial of a question of law, the decision of which in one way would have dispensed with the necessity of calling any evidence. It was proposed to call a very large number of witnesses.

The pleadings and arguments are fully set out in the judgment.

Alexander Grant, K.C., Trustram Eve, K.C., and G. D. Squibb for the plaintiffs.

Charles Harman, K.C., and Wilfrid Hunt for the defendants.

CROSSMAN, J.: In this action the plaintiffs claim, among other things, a declaration that a channel which runs through Madeley, in the borough of Wenlock, to the river Severn, is a sewer vested in and repairable by the defendants. The defendants, the corporation of Wenlock, are the sanitary authority of the borough.

By the Public Health Act, 1875, s. 13, it is enacted that :

All existing and future sewers within the district of a local authority [with certain immaterial exceptions for the purpose of this case] shall vest in and be under the control of such local authority.

By sect. 15 of the same Act, it is enacted that :

Every local authority shall keep in repair all sewers belonging to them, and shall cause to be made such sewers as may be necessary for effectually draining their district for the purposes of this Act.

By sect. 17 of the Act, it is enacted that :

Nothing in this Act shall authorise any local authority to make or use any sewer drain or outfall for the purpose of conveying sewage or filthy water into any natural stream or watercourse, or into any canal pond or lake until such sewage or filthy water is freed from all excrementitious or other foul or noxious matter such as would affect or deteriorate the purity and quality of the water in such stream or watercourse or in such canal pond or lake.

By sect. 4 of the same Act, it is enacted that :

In this Act, if not inconsistent with the context, the following words and expressions have the meanings hereinafter respectively assigned to them; that is to say, . . . "Sewer" includes sewers and drains of every description, except drains to which the word "drain" interpreted as aforesaid applies, and except drains vested in or under the control of any authority having the management of roads and not being a local authority under this Act.

And " 'drain' interpreted as aforesaid " means in effect what is described as a one-house drain, a drain draining one building only. So that in effect the definition of "drain" is that it excludes sewers and drains of every description except single-building drains and highway drains.

The plaintiffs in this case are the owners of land in Madeley through which the channel which I have mentioned runs for the greater part of its length in a covered culvert. They admit that the channel was originally a natural stream or watercourse, and say that by reason of the discharge of sewage into it the channel has changed its status and become a sewer, and that this has happened since the covered culvert in their land was constructed, that being since the passing of the Rivers Pollution Prevention Act, 1876.

After the plaintiffs had begun to lead evidence in support of their contention the defendants' counsel submitted before me that as a matter of law since the Rivers Pollution Prevention Act, 1876, a stream or watercourse could not become a sewer by reason of the discharge of sewage into it, meaning that it could not become a sewer within the meaning of the Public Health Act, 1875. If this submission is right the plaintiffs must fail in their claim so far as it is based upon the discharge of sewage into the channel whatever the evidence may be; and in those circumstances it appeared to me to be convenient to have the question of law decided before any further evidence was given; and, both parties consenting, on July 21, 1936, I made an order accordingly under R.S.C. Ord. 34, r. 2.

After the formal part that order is :

And the plaintiffs and the defendants by their counsel consenting to this order this court doth order that the following question of law be set down to be argued before this court, that is to say—(i) Whether the change of status from a natural stream to a sewer within the meaning of the Public Health Act, 1875, claimed in para. 5 (c) of the reply and defence to counterclaim to have taken place is in law possible.

It will be necessary for me to refer to the pleadings in order to show exactly what the meaning of that question is, but I now have to answer this question of law raised by that order.

Para. 3 of the statement of claim, which was delivered on May 10, 1932, is as follows :

A sewer vested in the defendants and receiving foul crude sewage from a large number of separate premises in the said borough [the borough of Wenlock] runs and at all material times ran from the points marked *B* and *C* on the said plan [annexed to the statement of claim] through the letters *D*, *E*, *G*, *H*, *J*, *K* and *O* and thence across the plaintiffs' premises between the letters *O* and *U* on the said plan with a fall in the direction shown by the arrows marked thereon. Between the letters *O* and *R* and *S* and *T* on the said plan the said sewer runs and at all material times ran in a covered culvert and elsewhere as shown in blue on the said plan in an open ditch. The said sewer is hereinafter for convenience and to use a neutral term called the culvert.

Para. 3 of the defence, which was delivered on July 13, 1932, is as follows :

The corporation [the defendants] say that the channel running from points *B*

and *C* on the plan annexed to the statement of claim and ultimately through the plaintiffs' premises between the points marked therein with the letters *O* and *U* was and is a natural stream or watercourse which ultimately falls into the river Severn. Such channel is hereinafter called "the watercourse." The watercourse and its tributaries rise beyond points *B* and *C* aforesaid and drain a considerable area. The corporation admit that the watercourse runs and has for many years run in a covered culvert through the greater part of its course through the plaintiffs' premises. The corporation do not admit that the course of the watercourse and the culvert is correctly shown on the said plan.

Para. 7 of the defence is as follows :

Certain storm water or surface water drains within the township of Madeley which is situated in the said borough discharge and have at all material dates discharged into the watercourse but the nearest of such drains to the entrance of the said culvert is 315 yards above the same. Such drains have existed for at least twenty-three years and all or some of these were made by the local authority of which the corporation are the successors. The corporation admit that in the case of about twenty houses sewage therefrom has been and is discharged into such surface water drains but this has been done for upwards of twenty-three years and the corporation say that there were and are prescriptive rights vested in the owners of the said houses so discharging sewage to continue so to do and the corporation could not and cannot prevent such discharge. The corporation also admit that forty-four further houses were erected in the said township between the years 1925 and 1929 pursuant to the Housing Acts and that the sewage from these houses has since then been and is discharged into pre-existing main water surface drains and through such drains or ditches in conjunction with surface water into the watercourse at a point about 315 yards above the mouth of the said culvert. All such houses were and are occupied. The corporation say that the said discharges into the watercourse were not and are not such as would affect or deteriorate the purity or quality of the water in such watercourse or to substantially increase the flow thereof. The corporation say that they acted and act under their statutory powers under the Public Health Act, 1875, and otherwise.

I read that paragraph, because it is necessary, to understand the question that is asked, to see what is in that paragraph ; but in fact the last passage in which the corporation deny that they deteriorate the purity or quality of the water is now, I think, withdrawn, and they do not now say so. In fact, they admit a certain part of the claim which the plaintiffs make in the event of the plaintiffs being wrong on the first point.

Then para. 5 (c) of the reply and defence to counterclaim, which is the paragraph referred to in the questions set out in the order, which I think will be intelligible after the paragraphs I have already read, is to this effect :

As to paras. 3, 4, 5 and 6 of the defence : The plaintiffs say that, at the time when the culvert and inspection shafts and spoil banks referred to in para. 4 of the defence were constructed and erected by some predecessor in title to the plaintiffs, which was before the year 1882, the channel referred to in para. 3 of the defence was a natural stream or watercourse not vested in or repairable by the then local

authority, the Madeley Local Board. The amount of sewage discharged into it at that time was not sufficient to change its status to that of a sewer. That change of status by discharge of sewage took place subsequently, at a time difficult to estimate with exactness but during the twenty-three years referred to in para. 7 of the defence. Upon that change taking place, the liability to repair the culvert and inspection shafts, the latter being "buildings works materials and things belonging" to the culvert within the Public Health Act, 1875, s. 13, fell upon the corporation, and has at all material times been and is upon the corporation, and the nuisance, annoyance, inconvenience, loss and damage referred to in the statement of claim all arise from the failure of the corporation to discharge the statutory duty referred to in para. 2 of the statement of claim.

It appears from this that the change of status referred to in the question of law which I have to answer is a change caused by the discharge of sewage into a natural stream at some time or times since the year 1909.

The Rivers Pollution Prevention Act, 1876, s. 3, is as follows :

Every person who causes to fall or flow or knowingly permits to fall or flow or to be carried into any stream any solid or liquid sewage matter, shall (subject as in this Act mentioned) be deemed to have committed an offence against this Act.

I do not think I need read the rest of the section, which is lengthy ; that is the substance of the prohibition as to drainage into streams or sewers.

By sect. 20 of the same Act, it is enacted that :

In this Act, if not inconsistent with the context, the following terms have the meanings hereinafter respectively assigned to them ; that is to say, . . . "stream" includes the sea to such extent, and tidal waters to such point, as may, after local inquiry and on sanitary grounds, be determined by the Local Government Board, by order published in the "London Gazette." Save as aforesaid, it includes rivers streams canals lakes and watercourses, other than watercourses at the passing of this Act mainly used as sewers, and emptying directly into the sea, or tidal waters which have not been determined to be streams within the meaning of this Act by such order as aforesaid.

The question of law raised by the order was very fully argued before me. Counsel for the defendants contended that after the passing of the Rivers Pollution Prevention Act, 1876, the discharge of sewage into the channel in question, which was admittedly at the date of the passing of the Act a natural stream, was an offence under the Act and therefore that such discharge could not convert the channel into a sewer within the meaning of the Public Health Act, 1875. They relied on some interlocutory observations of CHANNELL, J., in the case of the *West Riding of Yorkshire Rivers Board v. Yorkshire Indigo, Scarlet & Colour Dyers, Ltd.* (1). That case, which was decided in the year 1902, was a prosecution, or related to a prosecution, under the Rivers Pollution Prevention Act, 1876, and the county court judge who heard that prosecution had held that the channel in question was a stream within the meaning of

this Act. On appeal to a divisional court of the King's Bench Division, CHANNELL, J., said in the course of the argument, at p. 81 :

Must not you show that the sewage got into what was formerly a natural stream by some lawful authority, or, if not, that the thing had been proceeding for so many years that at the date of the Act of Parliament about rivers pollution [I think he must be undoubtedly referring to the Rivers Pollution Prevention Act, 1876] it had already become a recognised sewer? Must not you show one of the two, because otherwise, you see, if you merely show that a very great many people have put sewage into what was formerly a natural stream, all that you have got is a very strong case of the particular evil that the Act was meant to meet?

Counsel for the defendants in this case also relied upon the case of the *West Riding of Yorkshire Rivers Board v. Reuben Gaunt & Sons, Ltd.* (2). That case was decided on the same day and by the same court as the last-mentioned case.

Gaunt's case (2), the case I am now referring to, related to a prosecution not under the Rivers Pollution Prevention Act, 1876, but under a local Act similar to but not precisely the same as the Rivers Pollution Prevention Act, 1876, namely, the West Riding of Yorkshire Rivers Act, 1894. On delivering the judgment of the court in the King's Bench Division in *Gaunt's* case (2), LORD ALVERSTONE, at p. 185, said :

Further, we think that after the passing of the Acts of 1861, 1875, and 1876 - by that, I think it is quite clear he meant the Local Government Act, 1858 (Amendment) Act, 1861, that is what he calls the Act of 1861 ; secondly, the Public Health Act, 1875 ; and, thirdly, the Rivers Pollution Prevention Act, 1876—

the local authority could not merely by the illegal act of discharging sewage into a watercourse make that watercourse a sewer.

Counsel for the defendants also relied upon the judgments in the House of Lords in the Scottish case of *Airdrie Magistrates v. Lanark County Council* (3), where in an appeal against a decision that a local authority had been guilty of an offence under the Rivers Pollution Prevention Act, 1876, the EARL OF HALSBURY said that *Gaunt's* case (2) appeared to him to have been perfectly rightly decided. Counsel for the defendants also relied on the decisions of EVE, J., in *Hulley v. Silversprings Bleaching Company*, (4), and *Green v. Matthews* (5), that a prescriptive right to pollute a stream cannot be acquired by acts amounting to offences under the Rivers Pollution Prevention Act, 1876.

Counsel for the defendants drew a distinction between a sewer in law and a sewer in fact and contended that though a stream might by discharge of sewage into it since 1876 become in fact what is commonly called a sewer, it could not by virtue of such discharge become a sewer in law or a sewer within the meaning of the Public Health Act, 1875, s. 13. Counsel for the plaintiffs contended on the other hand that the

distinction between a sewer in fact and a sewer in law was improperly drawn and that in view of the definition of "sewer" in the Public Health Act, 1875, s. 4., a stream which has in fact become what is commonly called a sewer is a sewer within the meaning of sect. 13 of the Act and that this is so notwithstanding the change that has been caused by acts amounting to offences under the Local Government Act, 1858 (Amendment) Act, 1861, or the Public Health Act, 1875, or the Rivers Pollution Prevention Act, 1876.

Counsel for the plaintiffs referred to the case of *Falconar v. South Shields Corpn.* (6). The case was decided in the year 1895 and in that case the Court of Appeal—consisting of LORD HALSBURY, and LINDLEY and A. L. SMITH, L.JJ.—reversed the decision of the Chancellor of the County Palatine of Durham and decided that a burn had become a sewer within the meaning of the Public Health Act, 1875, by reason of the discharge of sewage into it and had vested in the defendants as the local authority. In that case the Rivers Pollution Prevention Act, 1876, was not mentioned and was not apparently regarded as having any bearing on the question at issue. No express mention was made of the date at which the pollution took place though the fact that the headnote in the case refers to vesting of existing sewers, the words "existing sewers" being in inverted commas, suggests that the burn had become a sewer before the coming into operation of the Rivers Pollution Prevention Act, 1876.

Counsel for the plaintiffs relied strongly on the decision of SWINFEN EADY, J. (as he then was) in the case of *A.-G. v. Lewes Corpn.* (7), and said that the decision in that case covered the present question. The headnote in that case begins as follows: "The discharge of sewage into the channel of an intermittent stream may have the effect of converting it into a sewer although the natural flow of the pure water is not cut off. No rule to the contrary is established"—then it refers to *Gaunt's* case (2) and the *West Riding of Yorkshire Rivers Board v. Preston & Sons* (8), which is a case that I am told has no bearing on the present question.

Counsel for the plaintiffs further contended that the *West Riding of Yorkshire Rivers Board* cases (1) (2) and the *Airdrie Magistrates* case (3) are not decisive of the present question because those cases relate only to prosecutions under the Rivers Pollution Prevention Act, 1876, by the West Riding of Yorkshire Rivers Act, 1894. They argued that as the definition of a stream in the Rivers Pollution Prevention Act, 1876, s. 20, includes water courses mainly used as sewers if they do not empty directly into the sea or tidal waters and a watercourse may still be a stream under the Rivers Pollution Prevention Act, 1876, notwithstanding that it has been so polluted as to have become in fact a sewer. They contended that the meaning of the *Airdrie Magistrates* case (3) is that it is no answer to a prosecution under the Rivers Pollution Prevention

Act, 1876, to show that the stream has become a sewer because the fact that it has become a sewer does not show that it ceased to be a stream within the meaning of the Act of 1876. The editors of the tenth edition of LUMLEY'S PUBLIC HEALTH, in their note on p. 711, appear to interpret the words of LORD ALVERSTONE in *Gaunt's* case (2), which I have quoted, as meaning that a stream does not become a sewer within the meaning of the Public Health Act, 1875, by reason of the discharge of manufacturing effluent into it in contravention of the Rivers Pollution Prevention Act, 1876, s. 4. The words of the note, which it is to be observed is on sect. 4 of that Act, are these :

A stream does not become a sewer within the meaning of the Public Health Act, 1875, by reason of the discharge of manufacturing effluent into it in contravention of this section.

This section is not the one referred to here ; as a matter of fact, sect. 3 is the one.

Then the learned editors refer to the *West Riding of Yorkshire Rivers Board v. Reuben Gaunt & Sons* (2). That is apparently the view they took of the *dictum*, as I think it is, in that case.

On p. 29 of the same book, which is a note on the definition of the word "sewer," they say this :

The court further held that after the year 1861 a local authority could not convert a watercourse into a sewer merely by the illegal act of discharging sewage into it.

I also observe that in HALSBURY'S LAWS OF ENGLAND, 1st Edn., Vol. 25, p. 724, in the article on "Sewers and Drains," at note (w) on that page there is this passage :

The illegal discharge of sewage into a stream after the year 1861 would not of itself convert a watercourse into a sewer (*West Riding of Yorkshire Rivers Board v. Reuben Gaunt & Sons, Ltd.* (2)).

But it is to be observed, considering those passages and the *dictum* in *Gaunt's* case (2), that LORD ALVERSTONE does not speak of sewer within the meaning of the Public Health Act of 1875, though I think that he must be taken to have meant that by the expression he uses. It was not material to *Gaunt's* case (2) to determine whether the stream had become a sewer within the meaning of the Public Health Act, 1875, but only whether the stream had ceased to be a stream within the meaning of the local Act, that is to say, the West Riding of Yorkshire Rivers Act, 1894. It is also to be observed that LORD ALVERSTONE referred to the discharge of sewage by the local authority and not to the discharge of sewage generally.

Taking everything into consideration, I do not think that I can regard LORD ALVERSTONE'S statement as an authority binding me to accept the proposition as stated in the notes in LUMLEY'S PUBLIC HEALTH and

HALSBURY'S LAWS OF ENGLAND, to which I have referred, as being the law. I do not think that the EARL OF HALSBURY'S statement in the *Airdrie* case (3) on p. 291, that *Gaunt's* case (2) was rightly decided can be taken or ought to be taken as referring in any way to LORD ALVERSTONE'S statement mentioned above. On the other hand, I do not think that I can regard either *Falconar's* case (6) or the *Lewes* case (7) as establishing the contrary proposition. The reference in the headnote to *Falconar's* case (6) to existing sewers, as I have already said, suggests that the burn had become a sewer before the passing of the Rivers Pollution Prevention Act, 1876, and the fact that that Act is not referred to in the *Lewes* case (7) may be because the stream emptied directly into tidal waters.

It is to be observed that SWINFEN EADY, J. (as he then was) said, on p. 508 of the report :

It is quite different from the case of sewage being led into a natural stream always flowing.

The plaintiffs' counsel also referred me to the case of the *Bethnal Green Vestry v. London School Board* (9), in which LORD HERSCHELL expressed the view that a pipe had become a sewer within the meaning of the Metropolis Management Act, 1855, and so had vested in the Vestry under that Act by reason of the connection of the pipe with a sewer although such connection was an unlawful act owing to the absence of certain assents or approvals. The plaintiffs' counsel also referred me to the cases of *Kershaw v. Taylor* (10), and *Holland v. Lazarus* (11), which go to show that a drain may become a sewer within the meaning of the Metropolis Management Act, 1855, by reason of acts which are wrongful.

I think that if the *dictum* in *Gaunt's* case (2) is to be taken as meaning that nothing can become a sewer within the meaning of the Public Health Act, 1875, by an illegal act, it is difficult to reconcile it with the decisions in the cases to which I have just referred.

It is to be observed that the note in LUMLEY'S PUBLIC HEALTH, on p. 711, is a note to sect. 4 only of the Rivers Pollution Prevention Act, 1876, and that the statement which though strictly limited is an important statement of law is not repeated elsewhere in the book. The note on p. 29 of that book only states the effect of the *dictum* as what the court held in *Gaunt's* case (2), without commenting on it.

In MICHAEL AND WILL ON THE LAW RELATING TO GAS AND WATER, 7th Edn., p. 560, in the editor's note on the West Riding of Yorkshire Rivers Act, 1894, s. 9, which is the local Act involved in *Gaunt's* case (2), I find that *Gaunt's* case (2) is quoted as an authority for the proposition that a natural stream or watercourse may cease to be a stream or watercourse and may become a sewer, and nothing else is said about the case.

On the whole I think that the question I have to answer is not covered by authority and I have to consider it as such.

The question is concerned with a sewer within the meaning of the Public Health Act, 1875, and the word "sewer" in that Act includes in its meaning—sect. 4 of the Act—sewers and drains of every description except what I may refer to as single-house drains and highway drains; and I can see no sufficient reason for excluding from the meaning of "sewers" in that Act a channel which has in fact become a sewer in the ordinary sense of the term by reason of the discharge of sewage into it; and I can find no sufficient ground for holding that the fact that the discharge of sewage which caused the channel to become in fact a sewer was in breach of provisions contained in the Local Government Act, 1858 (Amendment) Act, 1861, or the Public Health Act, 1875, or the Rivers Pollution Prevention Act, 1876, prevents the channel from having become a sewer within the meaning of the Public Health Act, 1875.

I have accordingly come to the conclusion that I cannot hold that the change of status from a natural stream to a sewer within the meaning of the Public Health Act, 1875, claimed in para. 5 (c) of the reply and defence to counterclaim, to have taken place is not in law possible, and I therefore answer the question of law raised by the order of July 21, 1936, in the affirmative.

Costs of the trial of the preliminary question reserved. Leave to appeal. Case to stand out of the list until after the appeal.

Solicitors: *Ford, Harris & Co.*, agents for *Leonard Gocher*, Birmingham (for the plaintiffs); *Gregory, Rowcliffe & Co.*, agents for *F. W. Derry*, Town Clerk, Wenlock, Ironbridge (for the defendants).

[Reported by REGINALD. TOWNSEND, ESQ., Barrister at Law.]

HERNIMAN v. SMITH.

[COURT OF APPEAL (Greer, Greene and Scott, L.JJ.), July 3, 6, 7, 8, 9, 10, 13, 1936.]

Malicious Prosecution—Reasonable and probable cause for prosecution—Conviction quashed in the Court of Criminal Appeal.

A timber merchant from time to time supplied a builder with timber. On several occasions deliveries of timber were made accompanied by fraudulent documents, which induced the builder to pay to the timber merchant money to which the latter was not entitled. The builder preferred a charge against the timber merchant of having unlawfully and knowingly conspired with one R. to cheat and defraud the builder. At the trial the timber merchant was found guilty and sentenced to imprisonment. On appeal to the Court of Criminal Appeal the conviction was quashed. The timber merchant thereupon brought an action against the builder for malicious prosecution. A jury found (i) that the builder had commenced and proceeded with the prosecution without any honest belief that the timber merchant was guilty of fraud, (ii) that the builder had failed or neglected to take reasonable care to inform himself of the true facts before commencing or proceeding with the prosecution, and (iii) that in commencing and proceeding with the prosecution the builder was actuated by other motives than desire to bring to justice one whom he honestly believed to be guilty. Judgment was accordingly given for the timber merchant. The builder appealed :—

HELD : (i) on the materials before the builder at the relevant time there was reasonable and probable cause for prosecution.

(ii) (GREER, L.J., dissenting as to the question of malice) there was no evidence that could be left to the jury on any of the questions put to them.

[EDITORIAL NOTE.] In the present case the prosecutor was successful in the criminal proceedings until the Court of Criminal Appeal was reached, and it was only then that the plaintiff in the malicious prosecution action was successful. Though this adds interest to the case, it also contains a very careful consideration of what amounts to reasonable and probable cause in a complicated case.

AS TO ABSENCE OF REASONABLE AND PROBABLE CAUSE, see HALSBURY, 1st Edn., Vol. 19, Malicious Prosecution, p. 685, para. 1463; and FOR CASES, see DIGEST, Vol. 33, pp. 499-502, Nos. 398-431.]

Cases referred to :

- (1) *Abrath v. North Eastern Ry. Co.* (1883), 11 Q.B.D. 440; 33 Digest 500, 418.
- (2) *Brown v. Hawkes*, [1891] 2 Q.B. 718; 33 Digest 504, 454.
- (3) *Bradshaw v. Waterlow & Sons, Ltd.*, [1915] 3 K.B. 527; 33 Digest 506, 493.
- (4) *Lea v. Charrington* (1889), 5 T.L.R. 678; 33 Digest 504, 453.
- (5) *Carder v. Peninsular & Oriental Steam Navigation Co.* (1892), 8 T.L.R. 335; 33 Digest 494, 345.

APPEAL by the defendant against a verdict and judgment at a trial before TALBOT, J., and a common jury, in which the plaintiff was awarded damages against the defendant in the sum of £5,000 for malicious prosecution and false imprisonment.

The plaintiff was a timber merchant, who, in the course of his business, supplied timber to the defendant, a builder. On Jan. 25, 1935, the defendant, before a justice of the peace, preferred a charge against the

plaintiff of having unlawfully and knowingly conspired with one Thomas Rickard, between Apr. 1, 1932, and Nov. 30, 1934, to cheat and defraud the defendant in the supply and delivery of timber, and in pursuance of such conspiracy unlawfully and by false pretences and with intent to cheat and defraud did obtain from the defendant on May 17, 1934, and Aug. 31, 1934, the sum of £34 contrary to common law. The defendant was granted a warrant for the arrest of the plaintiff and the plaintiff was arrested on Jan. 30, 1935, at his office and taken into custody, bail being allowed subsequently. The plaintiff was tried at the Central Criminal Court upon an indictment containing five counts :

Count 1.

STATEMENT OF OFFENCE.

Conspiracy to defraud.

PARTICULARS OF OFFENCE.

Robert Herniman and Thomas Rickard, between Apr. 1, 1932, and Nov. 30, 1934, in the County of Middlesex did unlawfully and knowingly conspire together to cheat and defraud Harold Christopher Smith, trading as H. Smith Brothers at Huxley Garden Estate, Edmonton, in the County of Middlesex, in the supply and delivery of timber by false representations as to the quantities and descriptions of such timber supplied and delivered, whereby the said Harold Christopher Smith was induced to part with money.

Count 2.

STATEMENT OF OFFENCE.

Obtaining money by false pretences contrary to the Larceny Act, 1916, s. 32 (1).

PARTICULARS OF OFFENCE.

Robert Herniman and Thomas Rickard, on a day between May 17, 1934, and Aug. 31, 1934, in the County of Middlesex, with intent to defraud, obtained from Harold Christopher Smith, trading as H. Smith Brothers at Huxley Garden Estate, Edmonton, in the County of Middlesex, the sum of £19 10s. 0d. by falsely pretending that in respect of a delivery of timber on May 15, 1934, they delivered to the said Harold Christopher Smith one and a quarter standards of timber more than was in fact delivered.

There were three further counts of obtaining money by false pretences of a similar nature.

Upon this indictment the plaintiff was found guilty on all five counts and sentenced to twelve months in the second division. The plaintiff duly appealed against the conviction and the conviction was quashed by the Court of Criminal Appeal on the ground that there was no evidence against the plaintiff fit to go to a jury.

In these circumstances the plaintiff, on July 17, 1935, issued a writ against the defendant for malicious prosecution and false imprisonment. The defendant denied that he had not reasonable and probable cause for preferring the charge against the plaintiff and denied that in so doing he had acted falsely or maliciously. The action was heard before TALBOT, J., and a common jury on Feb. 6, 1936, and judgment was given for the plaintiff in the sum of £5,000 and costs. The jury were asked the following questions and gave the answers annexed to them :

1. Has it been proved that the defendant commenced and proceeded with the

prosecution without any honest belief that the plaintiff was guilty of fraud?—Yes.

2. Has it been proved that the defendant failed or neglected to take reasonable care to inform himself of the true facts before commencing or proceeding with the prosecution?—Yes.

3. Has it been proved that the defendant in commencing and proceeding with the prosecution was actuated by other motives than desire to bring to justice one whom he honestly believed to be guilty?—Yes.

TALBOT, J., granted a stay of execution upon payment into court by the defendant of £4,000.

The following grounds of appeal were contained in the defendant's notice of appeal:

1. It was the duty of the judge at the trial to determine by himself the issue of reasonable and probable cause.

2. On the evidence the statements taken by the police, the depositions and exhibits, and the verdict of the jury at the criminal trial the learned judge should have ruled that there was reasonable and probable cause for the prosecution complained of.

3. The learned judge should have directed the jury that there was no evidence to support an affirmative answer to the questions proposed for them.

4. In the alternative the learned judge should have called the attention of the jury to the evidence in the depositions and should have adequately directed the jury upon the issues.

5. The verdict was against the weight of evidence.

6. The damages were unreasonable and excessive.

The plaintiff cross-appealed to reverse TALBOT, J.'s, refusal to order an amendment of the statement of claim in which the plaintiff claimed £5,000 damages, so as to claim the full amount of damages as assessed by the jury, namely, £6,500.

Serjeant Sullivan, K.C., and H. V. Lloyd-Jones for the appellant.

Comyns Carr, K.C., S. Parnell Kerr, and W. Russell Lawrence for the respondent.

Serjeant Sullivan, K.C.: (a) A plaintiff must prove by evidence, and his acquittal is not evidence of absence of reasonable and probable cause for the prosecution. (b) This issue is to be determined by the judge and is not an issue for a jury. In the present case there was no evidence of absence of reasonable and probable cause; the judge should have decided at the close of the plaintiff's case and did not in fact decide the question of reasonable and probable cause; this court should decide that there is no proof of absence of reasonable and probable cause. (c) There was no evidence to go to the jury on the question of malice. (d) There was no ground for the findings by the jury.

The peculiarity of an action for malicious prosecution is that the plaintiff has to prove a negative, namely, that the defendant did not believe and did not have any grounds of belief that he was guilty of the offence: *Lea v. Charrington* (4), *Carder v. Peninsular & Oriental Steam*

Navigation Co. (5). The plaintiff must therefore enter the depositions to show what did happen in the prosecution.

GREER, L.J. : Neither of these cases establishes the proposition that the facts stated by the prosecution in the depositions can be given in evidence at the trial.

Comyns Carr, K.C. : This court does not interfere with a verdict, except on certain well-recognised grounds : (i) that there was no evidence to be left to the jury ; (ii) that the verdict was against the weight of evidence, apart from mis-trial and mis-direction. The only question is : Was there evidence which could be left to the jury ? There was evidence upon which the jury could have found that he had no belief in his own case.

GREENE, L.J. : Was the judge right in thinking that there was evidence to go to the jury ?—that is the question.

GREER, L.J. : This is an important case and has lasted for a very considerable time. We have listened to a very vigorous argument by Mr. Comyns Carr and by Mr. Parnell Kerr in support of the judgment which was given in this case by a judge from whom I am very rarely, speaking for myself, able to differ, but I have come to the conclusion that in the present instance there was no evidence that could be left to the jury, either on the first or second questions which were left to them by the learned judge. The action in which the verdict was given was an action for malicious prosecution. One proposition that a plaintiff who sues for malicious prosecution has got to establish is that the result was not in favour of the prosecution, that is to say, that the charge failed in the result. I think that was satisfactorily proved in the present case, and although the magistrate committed the plaintiff and the judge thought there was a case to go to the jury and the jury found that the plaintiff was guilty, still that was not an end of the case, as the law provides that a defendant in the case who is indicted and found guilty is entitled to go to the Court of Criminal Appeal and say to the Court of Criminal Appeal : “ Look at the whole of the evidence in this case, under the powers which are given to you by the Criminal Appeal Act, 1907, s. 4.” Sect. 4 is in these terms :

The Court of Criminal Appeal on any such appeal against conviction shall allow the appeal if they think that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence, or that the judgment of the court before whom the appellant was convicted should be set aside on the ground of a wrong decision of any question of law or that on any ground there was a miscarriage of justice, and in any other case shall dismiss the appeal.

The power that has been given to the Court of Criminal Appeal is a very wide power and they were entitled to say : “ If we take all the evidence

that was given at the Old Bailey, not merely the evidence for the prosecution, but the evidence given for the defence, we think in this case there has been a miscarriage of justice and we set aside the verdict and judgment accordingly." This they did. It does not follow from the fact that the plaintiff was acquitted that therefore the prosecutor ought to be found guilty of the extremely dishonourable conduct which is suggested of him in this case. The learned judge was entitled to ask the jury certain questions, as laid down by BRETT, M.R., in the case of *Abrath v. North Eastern Railway Co.* (1), and in the form in which they were left the questions to the jury were proper questions to be put to them in a case of malicious prosecution. It is quite true as we pointed out in the course of the discussion that the decision of *Abrath v. North Eastern Railway Co.* (1) did not turn upon the law as laid down by BRETT, M.R., at all, but it accords with my experience of criminal cases and cases of malicious prosecution, that those questions have always been treated by judges in the King's Bench Division as proper questions to ask a jury in cases of malicious prosecution. The first question was this :

Has it been proved that the defendant commenced and proceeded with the prosecution without any honest belief that the plaintiff was guilty of fraud ?

No more serious charge could be made against anybody than that, although it is not a criminal act ; but it is an act so seriously dishonourable that I should have thought it required the very strongest evidence to support an affirmative answer to the question. As I understand the case so far as this part of it is concerned, it is this. The defendant, Mr. Smith, was a builder. He required for use from time to time for his business timber to be delivered, for which he paid in a way that is almost universal in the timber trade, namely, by bill, instead of by cash, and having at a time when there was about £1,300 outstanding either on bills that had become due or bills that were maturing, he had to meet the claim on one of the bills, and when he was face to face with the difficulty of saying that he was not bound to pay the bill, he took the view that he had been cheated by the plaintiff, who was asking him to pay the bill. Taking that view, before he did anything in the way of prosecution, he did what I think was the right and proper thing for him to do : he called in the police, whose duty it is to investigate criminal cases, and it seems to me to carry much more weight in his favour, that instead of merely asking his own solicitor to deal with it, he asked the police, whose duty it is to investigate crime, to assist him in making up his mind as to whether or not to prosecute. Now, he had at that time a statement by a man named Edger and a statement by a man named Dean as to the course of conduct that they had pursued in a great number of cases. Edger's evidence was capable of consider-

able suspicion, because he was putting forward the case that upon the instructions of his employer he was falsifying documents, and if the case merely depended upon Edger's evidence, I should have thought the magistrate would have probably said that in a case that merely depended on the evidence of a discharged servant who, according to his own view, had been trying to sell timber that did not belong to him, no weight should be attached to it and that there should not be a committal for trial. But it did not rest merely on Edger's evidence; it rested on the documents, and I look first of all at the documents in relation to the delivery of May 15, and I find it is quite impossible to suppose that the delivery at that date so far as the various items are concerned was other than a delivery of goods which had been received from the dock. If you take the first item, there was received from the dock six pieces which on the dock pass are measured as 20 feet in length. In the delivery note which is handed to Smith's checker, it is put down and negligently passed as six pieces 22 feet in length. Then we get two items, 33 and 23, which in the dock pass appear to be the measurements of 19 and 18, and when those are added together in the delivery note you find the delivery note calls them 56 pieces of 21 and 20 feet long. One can go through the whole of these and find exactly equally corresponding figures, showing, to my mind, conclusively that what was being delivered to Mr. Smith was what had been received from the dock and recorded in the dock pass. It seems to me impossible to form any other conclusion than that which I think even the defendant himself formed with regard to these documents, that they were fraudulent documents, faked, in order possibly to enable Mr. Rickard to get more than he otherwise would be entitled to, fraudulent documents which would have the effect of giving to Mr. Herniman a price for delivered goods from Mr. Smith, which Smith had never in fact received—a contract price for deliveries which had never in fact been received. Now, if there had been only one case of this kind, I can quite understand it being explained as a mistake. One case of that sort might pass without discovery through the office of Mr. Herniman. What happened with regard to the documents appears necessarily to be this: that in order that he might make his charges against Smith, Herniman must have the delivery notes, and in order to check the charges made against him by the importer from whom he got the timber, he must have also the dock passes which recorded that which was delivered by the dock, in accordance with the order which had been sent to the dock by Mr. Herniman. Now when we come to, not one case but, according to the evidence of the police who made the investigation, hundreds of cases, possibly two hundred cases like that with which we have to deal, is it to be supposed that such a man is dishonestly acting and is proved to have been acting dishonestly, having no conviction whatever with regard to the guilt of Mr. Herniman,

when he has got before him the advice which he received from the investigating officer of police. Though he might have no belief if there were only one case which might pass through the office without being discovered, it is highly improbable, though still a possibility, that one hundred or two hundred might pass through like this undiscovered. Are we going to say because Smith did not take that view of the transaction, therefore he was acting dishonestly and without any belief that the plaintiff was guilty when initiating the prosecution? I think such an inference is one which cannot be drawn from the facts proved in this case. With regard to the facts proved in some of the other evidence, though Smith had had the matter investigated by the police, he had the first statement of Dean before him, and it would not have been human if he had not come to the conclusion that here there was not an absence of reasonable and probable cause "which justifies me, an honest man, in saying I am entitled to use the criminal law to vindicate the position which I think is the right position in law." And that is how the prosecution starts. I am unable to come to any other conclusion than this: that there was no evidence tending to prove that the defendant commenced proceedings for prosecution without an honest belief that the plaintiff was guilty; and I pray in aid of that, as did Mr. Sullivan, the view that commended itself to the magistrate when he was asked: "Is there a *prima facie* case—not a conclusive case, but is there a *prima facie* case that ought to be tried by a jury?" and I think that view is also confirmed, as Mr. Sullivan said, by the judge who tried the case, an experienced judge in dealing with cases of crime and fraud; and the jury not only took the view that there was a *prima facie* case, but took the view that in their judgment there was a conclusive case against the accused. I am not saying they were right; I accept the view taken by the Court of Criminal Appeal that there was not in all the evidence sufficient to justify that certainty which has got to prevail in all criminal cases.

Then as regards the second question, it is this:

Has it been proved that the defendant failed or neglected to take reasonable care to inform himself of the true facts before commencing or proceeding with the prosecution?

How can it be said that he failed to take reasonable care to inform himself when the position as proved in this action was this. He had letters which have been referred to, which had passed between the parties; beginning with Nov. 28, Herniman is asking for an interview, writing to Smith:

Regarding the timber delivered to your Eastcote job, a list of which you gave the writer yesterday, I have gone into this question and find that the deliveries were practically as per order, some sizes were a little under and some over. As regards the 2 by 4 which you complain that 28 standards were delivered and

charged for, but could not have been put into the fourteen houses and which I agree. I paid a visit to the job on Tuesday and found 12-14 standards lying on one side unused, and which you have apparently overlooked, this with what is in the houses would make the 28 standards. Therefore I propose sending you on another bill in place of the one you ordered the bank to return on the 24th inst.

The reply to that is this :

We are in receipt of your letter and we are aware that there is a considerable amount of 2 by 4 at Eastcote and we are having this properly checked up [that is to say they are not satisfied with the explanation] so that we know where we stand. But it is not only at Eastcote where we consider there is a deficiency. We are complaining against the actual deliveries for which the bill was stopped, was drawn. We asked you to assist us by letting us have the dock delivery tickets, and we shall be glad to hear if you have obtained these.

The answer to the last question is this : " Regarding dock tickets, these are not kept invoiced "—I take that as meaning : " after the goods have been invoiced to me " ; but it was quite obvious that it would have been worse than useless for Smith to continue his inquiries from Herniman because Herniman had told him he had not got the documents and the only way in which he, Smith, could deal with that position when it was apparent he could not get the documents from Herniman was to see whether he could get the documents elsewhere. He did that. And when he got them they contained the faking manipulation to which I have referred, and he was told when they were investigated there were at least 200 cases.

Now, in those circumstances what is Smith to say to himself ? He begins with this, that undoubtedly, as is admitted, Herniman had got money to which he was not entitled—" Quite true " as Herniman puts it " there is only £40," but he certainly has made an admission that there is in his pocket at least £40 by the faking of documents. What would be the position of a man as regards reasonable and probable cause in those circumstances ? Would not he say to himself : " Herniman had been for some time carrying on a timber merchant's business. It must be supposed that he keeps some kind of books at which he can look for the purpose of ascertaining whether or not that which he had ordered from the docks was delivered to his customer," and he would have in addition to that running through his mind this question : " Is it reasonably possible that there can be so many of these cases and at the same time Herniman should know nothing whatever about it ? " It may be the truth, and I accept it as the truth, that Herniman did not know about it. But we are not considering Herniman's state of mind, we are considering the state of mind of Smith when he embarked on the prosecution and I take the view that as a reasonable man he would come to the conclusion that Herniman was affected by the evidence of the men who were acting on his behalf inasmuch as he had access to the documents and if he read them he could have corrected the mistake and

he had never done so. Now, in those circumstances if it were left to me to answer, I should say that there was reasonable and probable cause for prosecution.

I agree there is another question to be answered, but it is a separate question :

Has it been proved that the defendant in commencing or proceeding with the prosecution was actuated by another motive than a desire to bring to justice one whom he honestly believed to be guilty ?

That, I take it, may have been directed to the question of malice. Of course it is a little mixed up with the other question as to motives. Now, I agree that Mr. Comyns Carr has succeeded in establishing that there was an opportunity for Mr. Smith forming an opinion different from that which he did form—of forming an opinion favourable to Herniman and indeed and in addition to that Smith had an opportunity of checking that if he had thought it necessary to do so and that he had a motive other than the motive which ought to have influenced him. But the fact that a man has a motive for committing a crime or dishonest act or that he has an opportunity for doing so is not enough to justify an inference that he has in fact done so. There must be objective evidence to connect him with the crime of dishonesty ; and if you once get to that, the motive is a very strong confirmation of the crime or dishonest act, and so is the opportunity that he has for committing the crime or dishonest act. But opportunity and motives are not sufficient, there must be something more than opportunity and motive. I further agree that a man may be prosecuted from a malicious motive and yet at the same time the prosecutor may have reasonable and probable cause for prosecuting. There are many instances of people who have reasonable and probable cause for prosecuting who may exercise clemency and say : “ Although I have reasonable and probable cause for prosecuting A.B., I am not going to do it, I do not propose to be the cause of ruining him for the rest of his life.” On the other hand, there may be cases where there is quite clearly reasonable and probable cause in the mind of a man who has a spiteful motive as against the man whom he is prosecuting, and I cannot help thinking there is some evidence in this case which would have supported the finding of the jury that there was malice in the mind of Smith when he started the prosecution, but that does not seem to be fatal to his case if the other facts proved that there was in existence that which he was entitled to regard as reasonable and probable cause for the prosecution, and for these reasons, although with great hesitation, I think this appeal should be allowed and allowed with costs.

GREENE, L.J. : I agree, except as to one point on which I do not go so far as my Lord, namely, the question of malice ; I myself am not

satisfied that there was any evidence of malice sufficient to be left to the jury. However, that question was not very much debated before us and it is not necessary to decide it one way or the other.

Now, the relevant dates for consideration on the question of reasonable and probable cause are the date when the criminal law was first set in motion and the date when, after the hearing before the magistrate, Mr. Smith decided to ask for a committal. It is only confusing to consider facts which were only ascertained either in these proceedings or in the proceedings at the Old Bailey. The relevant question is: What was reasonable at those two times? Now, I myself would have no difficulty in coming to the conclusion (which by reason of what I shall say in a moment would only be a provisional conclusion), that the material before Mr. Smith at both those dates constituted a reasonable and probable cause for the initiation and the continuation of the prosecution. It seems to me that the documents which were available, and the statements which were before him, were amply sufficient to found in his mind a reasonable and probable conviction that he had been the victim of a series of serious frauds. Now Mr. Comyns Carr said this: Assume that is the case; there is a great gulf fixed between that conclusion and the conclusion that Captain Herniman had anything to do with that series of frauds. In what I am about to say it must not be taken that I am for one moment imputing to Captain Herniman any part in these frauds, but it appears to me, looking at the matter through Mr. Smith's eyes at those times with the material in front of him, that there was ample material to connect Captain Herniman with these frauds in Mr. Smith's mind. The fact that Mr. Smith proved to be mistaken is neither here nor there, for the present purpose. Then let me see what those facts were. The fraud of which Mr. Smith was apparently the victim was one the result of which, on the face of it, was to put money into Captain Herniman's pocket which Captain Herniman was not entitled to. It was perpetrated by means of documents which were Captain Herniman's documents bearing his name in print, handed to Mr. Smith's man by somebody who must apparently have been constituted Captain Herniman's agent for the purpose and filled in partly by one person and partly by another in circumstances which would lead an ordinary reasonable person to suppose that the persons who filled them in were agents of Captain Herniman for the purpose. The nature of the fraud was one which on the face of it put money into Captain Herniman's pocket, to which he would not be entitled. The matter does not stop there, because certain correspondence ensued between the parties, as the result of which or in the course of which Mr. Smith made the very reasonable request, coming from one business man to another, that any evidence in Captain Herniman's possession should be produced which would enable Mr. Smith to check the deliveries that

had been made to him. Now, the answer given to that request was a most unsatisfactory one. I am not saying by that that Captain Herniman in giving it was in any way dishonest, I am only concerned with the impression that such an answer would leave on the mind of a reasonable man, and the impression which in my judgment would be left on the mind of a reasonable business man would be that Captain Herniman was evading the question and was not prepared to produce the checks which any reasonable business man would expect him to have in his office. In addition, Mr. Smith knew that document which could have been used as a check, namely, the dock passes, had come to Captain Herniman's hands.

Those being the circumstances, the matter having been placed by Mr. Smith into the hands of the police for investigation, by the time the prosecution was launched a considerable body of material had come into Mr. Smith's possession, material which I may say would not only confirm on the face of it what Edger had told Mr. Smith, but would confirm it in a very striking way. On the face of it, it is only necessary to examine the dock passes and delivery notes to form a conclusion with regard to the two sets of documents. I am thinking, for instance, of the case my Lord analysed. The two documents are obviously purporting to deal with the same goods. When the prosecution was launched and when Mr. Smith decided to apply for a committal, in my judgment, there was ample ground for his doing so on the material before him. But that, of course, is not enough and for this reason, that however strong a case of reasonable and probable cause what I may call the objective facts may disclose, it may be that the person who launches the prosecution does not, in fact, honestly believe in the guilt of the person whom he is prosecuting and therefore any conclusion must be provisional pending an investigation of that issue.

Mr. Comyns Carr relied on a number of matters which he developed in very great detail as affording sufficient evidence to leave to the jury on that question, as in fact it was left to the jury by the learned judge, but speaking generally of the matters to which Mr. Comyns Carr referred I am quite unable to find in any of them taken singly or in all of them taken together, any evidence fit to be put before a jury on the question whether the prosecution was commenced and proceeded with, without any honest belief in the guilt of Captain Herniman. I do not propose to go through with them, but I may just say a word or two with regard to what I think are the more important ones. It was said for instance that at any rate when the evidence had been given at the police court the material available from Edger's cross-examination was sufficient, to the mind of any reasonable person, to absolve Captain Herniman from any complicity in this fraud. I take the opposite view. It appears to me the admissions, such as they were, which were obtained from

Edger were admissions with regard to a fraud of a totally different character from the one which on the face of the documents would appear to Mr. Smith to have been perpetrated against him. Now, it is perfectly true in the way Mr. Carr analysed the two frauds (assuming all the facts to be as he said they were), the net result might in many particulars be the same. But Mr. Smith did not know all those facts. Mr. Smith did not know the method of dealing between Captain Herniman and Mr. Rickard. He did not know what stocks Mr. Rickard had. He did not know how goods were ordered by Captain Herniman from stocks held by Mr. Rickard. He did not know whether there was or was not any system of checks kept either by Mr. Rickard or Captain Herniman with regard to those stocks. Mr. Smith could only deal with the material before him. For my part I attach some little importance to the circumstance that when the matter was heard at the police court the two defendants, Captain Herniman and Mr. Rickard, who had not at that time severed in their defence, reserved their defence. That may have been a very wise course, and it may explain the fact that Captain Herniman did not give any explanation at the police court of the documents which had been the foundation of the charge. This failure to give an explanation may have been due either to the fact that at that time Captain Herniman was associated with Mr. Rickard in the defence and represented by the same counsel, or it may have been wise tactics in any case on the part of his advisers. That does not affect Mr. Smith. If it be the case that Captain Herniman's explanation was so simple that any reasonable inquiry would have found out what the explanation and the true facts were, it would have been reasonable to expect that Captain Herniman before the magistrate would have given his explanation. If he had done so and Mr. Smith had proceeded with the prosecution, different considerations would have applied to subsequent events. But he did not produce the explanation which was, it was said, so simple and obvious that any sane man (to use Mr. Comyns Carr's expression) could not have failed to observe it. That seems to me to be a serious criticism of the argument put forward.

Another matter relied on was the book kept of records showing Mr. Rickard's deliveries, and Mr. Comyns Carr relied upon that document as showing that in some cases one delivery to a customer of Captain Herniman's was the result of two or more collections from a supplier or suppliers. That those cases happened is unquestionably apparent. What the argument entirely fails to recognise is that unless in the examples put before us in this case the goods comprised in the dock pass are the same as the goods which purport to be shown on the deliveries record book, the book shows this very remarkable fact, that Mr. Rickard is making no charge at all for the goods which he did in fact collect from the docks. Now, I should have thought myself that anyone looking at

the record book with the dock pass and delivery note in front of him would have entertained no doubt as to the proper inference to be drawn from all the documents. It would confirm that he was right in linking up, or marrying (to adopt the convenient expression used) the dock pass with the delivery note ; and the record book, so far from throwing any doubt on that union, appears to me to afford striking confirmation of it. Mr. Comyns Carr also relied on things like this, that Edger's information turned out with regard to certain deliveries to be clearly untrue. What if it did ? Edger's record no doubt in many particulars was inaccurate, possible deliberately so. But what bearing that has on Mr. Smith's belief with regard to the other matters in regard to which he had very strong documentary evidence, I am really at a loss to see. The same observation applies to the Eastcote case with regard to which Mr. Carr said—I am not satisfied he was right, but I will assume that he was right—that Mr. Smith was ultimately satisfied. As to Eastcote, again I ask, what if he was satisfied ? It cannot be that, because he was satisfied as to Eastcote and the explanation given as to Eastcote, that this constituted evidence that he did not honestly believe in Captain Herniman's guilt with regard to the other matter.

I do not propose to go through the various other matters relied upon. I have only taken one or two examples of the sort of thing relied upon as evidence fit to be placed before a jury on that issue. None of the points relied upon by Mr. Comyns Carr if taken by itself would in my judgment be evidence fit to go before a jury on this issue. But he said that taking them together they were fit to be put before the jury. That is an observation which in many cases is no doubt very much to the point. But this is a case where, in my judgment, nothing added to nothing makes nothing and it is not possible by adding a lot of things together to produce something which you are then entitled to say in the aggregate forms evidence fit to be considered by a jury.

With regard to the second question I do not think I need add very much. The circumstance that chiefly weighs with my mind is the action of Mr. Smith in placing the matter in the hands of the police. This was a thing which seems to me in the circumstances to have been a reasonable and sufficient step to take in order to be sure that trained and experienced investigators should examine the available material. In employing the detective sergeant to do it he was putting the case into skilled hands—into the hands of a person who had experience in investigation which I do not suppose Mr. Smith himself possessed. Another matter which impresses me upon this issue is that Mr. Smith having inquired of Captain Herniman at an early stage as to whether he had any evidence at all to satisfy him with regard to the deliveries made to him, he received the very unsatisfactory answer to which I have referred. I think that that really concludes all I have to say on this

part of the case. In my judgment there was no evidence fit to go before the jury on either the first or the second question. Now, that being so, Mr. Carr then says, and quite rightly says, that even if those questions had been answered in favour of Mr. Smith, he would still have been entitled to submit that the question of reasonable and probable cause was not necessarily concluded by those answers. In that he is theoretically right. But on the facts of this case as I have already said, taking upon myself the function of the trial judge whose place it was to decide the question of reasonable and probable cause, I entertain no doubt whatsoever that there was reasonable and probable cause for the prosecution. I have stated my reasons for so thinking at the beginning of this judgment. Therefore, in my opinion, this appeal should be allowed.

SCOTT, L.J.: I agree generally with both judgments but on the question of malice I share the view expressed by GREENE, L.J., that there was no evidence to go to the jury. In my opinion if this appeal failed it would be very unfortunate from a broad public point of view. It is of the highest importance that a lay member of the community acting honestly and reasonably should be free to initiate a prosecution without fear of an action for malicious prosecution succeeding against him; but if the verdict and judgment in the present case were allowed to stand, I think there would be few cases where a man could prosecute without grave peril of being hit in an action for malicious prosecution. For in this case I can see nothing to raise a doubt in the learned judge's mind on the issue of reasonable and probable cause. And if he ought to have decided that issue in favour of the defendant the third question became irrelevant; for the mere fact (if it had been a fact, though I see no evidence of it) that the prosecutor was maliciously minded towards the present plaintiff would have constituted no cause of action. If a man is taking a course against which no legal objection can be raised, the fact that he has bad motives for taking it gives rise to no cause of action. The answer to the third question, however, as I have already said, was not based upon evidence which in the view of myself and GREENE, L.J., ought to have been left to the jury.

As regards the first two questions, I will deal with the answer to No. 2 first, namely, that the defendant here failed or neglected to take reasonable care to inform himself of the true facts before commencing or proceeding with the prosecution. If in any case the facts known to the would-be prosecutor reasonably are such as to cause him fairly and honestly to conclude that the defendant is guilty of the offence, there is no law which compels him to prosecute further inquiries in order to ascertain whether there is further information obtainable in support of the prosecution on which he has decided. If he once has reasonable and probable cause, the law says that is enough. If any authority is

wanted for that view it is to be found in the case of *Brown v. Hawkes* (2), where the subject was considered at length in the well-known judgment of CAVE, J., with regard to which in the same case on appeal, at p. 727, BOWEN, L.J. (as he then was), says :

The few words I shall add do not in any degree go to modify anything in the declaration of the law which has been already given, more particularly in the admirable exposition of the law in the judgment of CAVE, J.

A similar view was expressed by PICKFORD, L.J., in the case of *Bradshaw v. Waterlow & Sons, Ltd.* (3), at p. 533. Here, in my judgment, the learned judge ought himself on the information which was before Mr. Smith at the time when he initiated the prosecution and *a fortiori* when he decided to ask for a committal to have held that there was no absence of reasonable and probable cause, and at the lowest that the *onus* resting on a plaintiff in an action of malicious prosecution had not been discharged although in my view one can properly put it higher than that, and say that here there definitely was reasonable and probable cause, for the reasons that my learned brethren have given in their analysis of the evidence.

On question No. 1: "Did the defendant commence and proceed with the prosecution without any honest belief that the plaintiff was guilty of fraud?" I cannot see that there was any evidence whatever to be left to the jury. In my view the prosecution was one in which the prosecutor was justified on the evidence which was then before him at each of the two stages in coming to the conclusion that in the proceedings he proposed the plaintiff was guilty.

We know that the Court of Criminal Appeal has decided that the evidence on the whole case was not sufficient to justify a conviction. I am saying nothing that in any way whatever involves any criticism of that judgment. It is just the ordinary position in a case of malicious prosecution in which of course no action can be launched unless there has first been an acquittal. So far as I am concerned that aspect of the matter does not affect or in any way influence anything that I have said. I agree with the other judgments of the court.

Solicitors: *W. R. Nash* (for the appellant); *Crofts & Ingram and Wyatt & Co.* (for the respondent).

[Reported by LESLIE CARNEGIE, ESQ., Barrister-at-Law.]

Re SPENCER FLATS, LTD.[CHANCERY DIVISION (Clauson, J.), **July 27, 1936.**]

Covenants—Restrictive covenants—Discharge and modification—Application for declaration that covenants unenforceable—Appeal from official arbitrator—Law of Property Act, 1925, (c. 20), s. 84.

The appellants acquired certain property which was subject to certain restrictive covenants arising under a building scheme. They pulled down the house which was upon the property and in breach of the restrictions erected a block of flats. No objection to the building was made for over a year from the time when the work was commenced, and then the owners of the adjoining houses drew attention to the breach and suggested to the appellants that an application should be made under the Law of Property Act, 1925, s. 84, for modification of the restrictive covenants. Application was duly made and the official arbitrator made an order for the release or modification of the restrictions, subject to the payment of £200 to each of the owners of the adjoining houses. No application was made to the court under sect. 84 (2) to determine the nature and extent of the restrictions, and whether they were enforceable and if so by whom. The appellants contended that as the owners of the adjoining houses had only an equitable right, they had by the delay in making their objections lost their right to enforce the covenants, and that they were not entitled to the sums of £200 :—

HELD : as no application had been made to the court under sect. 84 (2) the court ought not in the circumstances to hold that the arbitrator was wrong in considering that the owners of the adjoining houses were not shown before him to have lost their right to the benefit of the covenants.

[EDITORIAL NOTE. The Law of Property Act, 1925, s. 84, provides for the discharge or modification of restrictive covenants. The general procedure is to apply to the official arbitrator, but there is also a provision for application to the court to decide whether covenants are still enforceable. As this is generally a complicated matter, it would seem that the better plan would be to apply to the court in any case where it is seriously contested that the restrictions have for any reason ceased to be enforceable. The jurisdiction of the arbitrator, it appears to be suggested, does not extend to a question of law, but merely to ascertain the facts and assess compensation.

FOR THE DISCHARGE AND MODIFICATION OF RESTRICTIVE COVENANTS UNDER LAW OF PROPERTY ACT, 1925, s. 84, see HALSBURY, Hailsham Edn., Vol. 20, p. 232, para. 254 ; and FOR CASES, see DIGEST Supp., Sale of Land, Cases 2807a-2807c.]

Cases referred to :

- (1) *Kelsey v. Dodd* (1881), 52 L.J. Ch. 34 ; 28 Digest 430, 544.
- (2) *Sayers v. Collyer* (1884), 28 Ch. D. 103 ; 28 Digest 412, 371.
- (3) *Leeds (Duke) v. Amherst (Earl)* (1846), 2 Ph. 117 ; 28 Digest 426, 506.
- (4) *Northumberland (Duke) v. Bowman* (1887), 56 L.T. 773 ; 28 Digest 426, 504.
- (5) *Devonshire (Duke) v. Brookshaw* (1899), 81 L.T. 83 ; 36 Digest 171, 134.

APPEAL from an order of the official arbitrator appointed under the Law of Property Act, 1925, s. 84, dated June 8, 1936. The order was made as the result of an application made under the section by Spencer Flats, Ltd., the present appellants, for the release or modification of

restrictions affecting a house known as No. 10, Spencer Park, Wandsworth Common, in the County of London, and by it the restrictions were modified as therein set out, subject to the payment of a sum of £200 to each of the owners of the adjoining houses, Nos. 9 and 11, who appeared as objectors to the application, and subject to the payment of certain costs. The part of the order appealed from was that ordering the payment of the sums of £200, the appellants contending that the respondents had, by their acts, deprived themselves of any right to compensation for the reasons following.

The appellants acquired the property No. 10, Spencer Park, on May 31, 1934, for the sum of £2,000, for the purpose of converting it into flats. The work of conversion was begun in June, 1934, and was completed in Sept., 1934, at a cost of £5,320, and the first tenant of a flat took possession on Oct. 1, 1934. No objection to the alterations was made by the adjoining owners to the appellants until Oct. 9, 1935, although protests were made to the committee in control of a centre garden common to all the houses and to Earl Spencer, the original covenantee, and also to the appellants' foreman, and the owner of No. 11 consulted his own solicitor. On Oct. 9, 1935, the solicitors who acted for the respondents wrote to the appellants' solicitors drawing their attention to their clients' breach of the restrictive covenants by the erection of the flats, and stating that they had been instructed to commence proceedings for an injunction to restrain such breach or alternatively for damages. But they also pointed out that an application had recently been made to the official arbitrator under the Law of Property Act, 1925, s. 84, for modification of the covenants to allow the conversion of No. 21, Spencer Park, into flats, and suggested that the appellants might desire to take a similar course. As a result the appellants made the application leading to the order from which they now appealed.

It was common ground between the parties that the case was not one of a legal covenant but of an equitable restriction arising under a building scheme and, that being so, the appellants contended that the respondents' delay in making any objection to the appellants' breach of the covenant in erecting the flats for over a year from the time when the work was commenced, and their allowing them to lay out the sum of £5,320 in the work of conversion, would amount in equity to a good defence to an action for an injunction. Although that objection was raised before the official arbitrator, he disregarded it and proceeded to deal with the objections, and to assess the compensation, on the basis that the respondents were legally entitled to the benefit of the restrictions.

H. B. Vaisey, K.C., and *Miss M. K. Haskell*, for the appellants : If this had been a legal covenant for which an action could have been brought at law, nothing but the Statute of Limitations would have saved the appellants from such an action. But the rights of the respondents

being purely equitable, their acquiescence in what the appellants were doing would effectively have prevented their bringing an action either for an injunction or for damages. The compensation payable is not by way of damages for disregarding the covenant but by way of compensation for injury caused by the release of the covenants: see the proviso to sect. 84 (1). Although the respondents may have suffered loss from the disregard of the covenants they have suffered none from their release. If the respondents had, in Oct., 1935, carried out their threat of bringing an action for an injunction and damages, they could not have succeeded, because their claim would have been in equity and they have stood by and allowed the appellants to incur all the expenses of converting the house.

CLAUSON, J.: But they would have been entitled to damages even if they could not have got an injunction.

Vaisey, K.C.: They would have been entitled to damages only if they would have been entitled to an injunction. Their equity was to stop the appellants doing the work, not to recover damages: see *Kelsey v. Dodd* (1) and *Sayers v. Collyer* (2). For the definition of acquiescence see *Duke of Leeds v. Earl of Amherst* (3).

CLAUSON, J.: If the covenant had been simply not to erect a new building I could have understood your argument, but this was a continuing breach.

Vaisey, K.C.: It may have been in one sense: see *Duke of Northumberland v. Bowman* (4). But that case was distinguished from *Sayers v. Collyer* (2).

Andrew Clark, for the respondents: The question of acquiescence is dealt with by sect. 84 (1) (b). I am not excluded from compensation even if I do come within that subsection, which merely indicates one of the things which is a condition precedent to any order for modification being made at all. But in fact the respondents have done nothing to bring themselves within the subsection. The omission for one year to bring an action is not sufficient evidence of acquiescence. There is no evidence that the respondents knew that the building was to be used as flats. Delay alone is not proof of acquiescence, and although it might disentitle the respondents to a mandatory injunction, the user of the building as flats is a continuing breach and the respondents might in an action have got damages in lieu of an injunction: see *Duke of Devonshire v. Brookshaw* (5). The facts in *Sayers v. Collyer* (2) were very different from the facts in this case. But the question whether the appellants would have had a good defence to an action is immaterial to this appeal. Such a question could not have been decided in an arbitration of this sort. If the appellants do not want the order which they have obtained, they need not take it up, and can leave the respondents to bring an action against them for their continued breach of the restrictions.

The possible result of such proceedings cannot affect the question of what loss the respondents have suffered, which was a matter for the official arbitrator to decide. The only way to oust the jurisdiction of the arbitrator would have been to show that the respondents' case was so hopeless that they could not even have framed an action. What they have lost is the right to bring an action owing to the right of the appellants to ask for a stay of their threatened action under sect. 84 (9).

Vaisey, K.C., in reply: It would not have been sufficient for the appellants successfully to have fought an action by the respondents, as that would not have cleared their title. They were obliged to get the restrictions modified.

CLAUSON, J.: Facing Wandsworth Common there are three houses, Nos. 9, 10 and 11, Spencer Park. I have been shown agreed photographs of them. They were houses which, I suppose, at the present day might seem old-fashioned in appearance, standing in comfortable gardens backing, as regards Nos. 9 and 10, upon a centre garden, which is reserved for the enjoyment of the houses backing on to it by the usual device of a conveyance by the original owner to trustees. No. 11 seems to back, to a slighter extent on to the centre garden and to a greater extent on the garden of another house. No. 10, which is the house with which I am concerned, is subject to certain restrictive covenants which I need not read at length, but which were of this character, that is to say, not to permit the house and other buildings to be used for the purpose of any trade, manufacture, business or profession or otherwise than as a private residence (except that they may be used by a medical man for the purpose of his profession), and not to permit any clothes or washing to be put out to dry in the garden or ground attached to the house or to erect any additional buildings, with certain exceptions and subject to certain conditions, on certain portions of the ground attached to the house, and so forth. In those circumstances a company, known as Spencer Flats, Ltd., acquired this house and were minded to pull down the existing building and to build an erection, which has since been built, of quite obviously modern style, which, by its interior accommodation, is suitable for letting out in 12 flats. Spencer Flats, Ltd., were, of course, aware of the restrictions attaching to this house, but they proceeded to pull it down and to build this new erection notwithstanding their existence. They acquired the property at some date in the spring of 1934, the building operations continued until about Sept., 1934, and I understand that the first flat was let soon after the building was completed.

Also abutting on Spencer Park is a house referred to as No. 21, and it would appear that the owner of that house, who was also minded to convert it into flats, made an application under the Law of Property Act, 1925, s. 84, that the restrictions that Spencer Flats, Ltd., had been

prepared to disregard, and which, I think I may assume, were probably of the same nature as those applying to No. 21, should be removed or modified. The result of that application was that on Aug. 1, 1935, one of the official arbitrators made an order for the modification of the restrictions, and he appears, as part of his order, to have provided that it should be on the terms of some compensation being paid to each of the two adjoining owners. By that time a period of nearly a year had expired since the flats at No. 10 had become occupied, and in Oct., 1935, the two adjoining owners of No. 10, that is, of Nos. 9 and 11, whose attention may well have been drawn to what had happened in regard to No. 21, threatened Spencer Flats, Ltd., with an action upon these restrictive covenants. They did not actually issue a writ. What seems to have happened is that they communicated with Spencer Flats, Ltd., and suggested that as no doubt, if they did issue a writ, Spencer Flats, Ltd., would take advantage of sect. 84 (9) and ask for leave to appeal to the authority for the modification of the restrictions and for a stay of proceedings meanwhile, it was hardly worth while incurring the expense of issuing a writ. What in fact occurred was that on Dec. 5, 1935, Spencer Flats, Ltd., applied to the official arbitrator in the usual way to exercise the powers under sect. 84 and modify the restrictions so far as they related to No. 10. That application came before the official arbitrator and resulted in an award on June 8, 1936. The award was in the form appended to the Law of Property (Restrictive Covenants Discharge and Modification) Rules which were made in 1933 under sect. 84 by the reference committee for England and Wales constituted under the Acquisition of Land (Assessment of Compensation) Act, 1919, and it provided for the modification of the restrictions upon certain terms as to washing being hung out and things of that kind with which I need not trouble, on certain terms as to the payment of costs, and on the terms that the two adjoining owners should each be paid £200. The order provides :

I further order and direct that the applicants do pay to the objectors to this application whose names are set out in the following schedule and whose legal title to the benefit of the restrictions hereby modified or discharged is admitted, the sums set out hereafter against their respective names on or before July 31, 1936, as compensation in respect of their interests in the properties set out against their respective names.

In default of payment or satisfaction or discharge of the sums so specified within the time specified, the order is to be inoperative. From that order Spencer Flats, Ltd., now appeal and ask me to say that the award should be corrected to this extent, that they, Spencer Flats, Ltd., should not be required to pay these two sums of £200 as compensation. The costs, I understand, have been paid, and there is no objection to the other details of the award. The question, therefore, which I have to

decide is whether the arbitrator was right in awarding £200 to each of the adjoining owners.

When the matter came before the arbitrator what occurred was this. Spencer Flats, Ltd., by their counsel, attended the proceedings and informed the arbitrator that no action had been taken by anyone for an injunction to restrain the conversion (I am reading from the arbitrator's note) and that the application was to regularise an accomplished fact. It would further appear from the arbitrator's note that he was given to understand that the objectors were legally entitled to the benefit of the restrictions. On that point it is suggested, and I think no doubt correctly, that the rights of the two adjoining owners are not, in the strict sense, legal but equitable rights, and I am informed by counsel, and I accept it, that counsel pointed that out to the arbitrator. Counsel also pointed out that, the rights of the objectors being equitable, if they sought to enforce them they would in equity be subject to certain equitable defences. Exactly what happened I do not know, but I think I may take it from the arbitrator's note that, whatever he may have thought of the objection, he was of the opinion that he must proceed on the ground that the objectors were entitled to the benefit of the restrictions.

The way the matter is put is this. It has been argued before me to-day that, having regard to certain facts, the objectors, having a right in equity only, have lost their right to enforce their objections. It is said that a court of equity would not enforce their objections and that that is one reason why they ought not to get the compensation which the arbitrator has awarded them. In view of any future cases which may arise, I want to make these remarks. There is machinery provided by sect. 84 (2) for the court to determine, on the application of any person interested, among other things whether restrictions are, in any particular case, enforceable and by whom, and by the rules made under that section it is provided that if, whether before or at the hearing, it appears to the arbitrator that a question arises as to whether or not any land is affected by the restriction, or as to what, upon the true construction of any instrument purporting to impose the restriction, is the nature and extent of the restriction thereby imposed, or as to whether the same is enforceable, and, if so by whom, the arbitrator may require an application to be made to the court for the determination of the question in manner provided by the subsection, and may adjourn the case, pending the hearing of such question by the court. It will be observed that the effect of that provision is not to make it imperative for the arbitrator to adjourn the case pending the hearing of any such question as is referred to in the rule by the court, and what I want to say is this, that I think if, in proceedings under sect. 84, a question is seriously raised which involves a question of law as to whether or not some of the objectors have lost their right to enforce the restrictions,

the arbitrator, although the relief is discretionary, as a rule would be very unwise in abstaining from requiring that question, assuming it to be a serious and not merely a frivolous one, to be raised in proceedings before the court. For it is quite obvious that the arbitrators are not intended to be a tribunal to deal with questions of law, and that is precisely the reason why this machinery is provided by subsect. (2) and why that subsection takes the form it does. I need scarcely say that, if I had any reason, sitting as an appellate tribunal, to suppose that an application had been made to the arbitrator to adjourn the case in order that the matter might be considered by the proper tribunal with which he had not thought fit to comply, and if it turned out that the point was a serious one, I should feel bound to send the case back to the arbitrator with a recommendation that the proper steps should be taken to permit of the legal question being determined. In this particular case, although I am told that the point was raised by counsel that the objectors had lost their equitable rights, no suggestion seems to have been made that the point was one of such moment that it should be determined by the appropriate tribunal. No suggestion was made for the matter to be dealt with by the court.

Then the evidence was taken and the evidence comes to this. First of all there is the question of compensation. The objectors have suffered a loss in consequence of the order modifying the restrictions being made. Evidence was given by professional witnesses that the selling value of the two houses was diminished by the sum of some £320 in respect of each house. There was in substance, as I read the arbitrator's note of the evidence, no countervailing professional witness, and I am entitled, I think, to rely on this that, in the final discussion, when counsel for the applicants addressed the arbitrator, suggestions were made that the figure of £320 was excessive and that the right figure should be something less than the £200 ultimately awarded (I think the figure of £150 for each house was mentioned). But the matter at that stage seems to have been treated as a question of figures for the arbitrator, and on the evidence, as I read it, the arbitrator was quite justified in holding, as he did hold, that though the objectors were claiming more than that to which they were properly entitled as a consequence of the modifications, yet that something was due to them, and that the proper figure was the sum of £200. In other words, there was plainly evidence before him to justify him in deciding as he did to award each of the objectors £200, and to that extent it would be impossible for me to interfere with his award.

It is suggested, however, that there was enough evidence of laches or acquiescence on the part of the objectors to justify the arbitrator, or rather to make it necessary for the arbitrator to hold that, having regard to the conduct of the objectors, they had lost their right to

enforce the covenants. It was put in this way. It was said that, on the evidence, it would have been clear that if, at the date of the application, the objectors had sued on the restrictions, they would have failed, because of the facts which were proved in evidence before the arbitrator. It was proved in evidence that no objection was made to Spencer Flats, Ltd., by either of the two objectors, until the letter threatening action was written in October, 1935, rather more than a year after the date at which the flats were occupied. It seems to me that it would be impossible for me, and I think it would have been equally impossible for the arbitrator, to hold that the mere fact that there was this delay made the least difference to the amount of this damage which he thought, on the evidence before him, had been satisfactorily proved at £200. The point really is this. It is suggested that on this evidence I ought to hold that the objectors had altogether lost their right to enforce these covenants. In these proceedings I do not propose to go through the authorities which have been cited, but I do not think it would be possible to say that the objectors had certainly lost their rights, even though a good defence might have been put up to the action which in effect was started by the objectors, but which was suspended for the moment by this application. All I can say is that it is impossible for me to hold that the evidence which has now come out is evidence which would have furnished an adequate defence to that action, and I should hesitate long to upset the award on a submission of this sort, when, although the submission was made to the arbitrator, there is no suggestion that it was made in such a way as to suggest that it was of such a serious character that, as a matter of law, it ought to be determined by a legal tribunal. As the machinery which I have indicated for obtaining that result was not resorted to, it is not surprising, in my view, that the arbitrator did not feel able to attach any very great importance to this point, and as the obvious method of solving the difficulty which the applicants suggested lay in the way of the objectors was not used, I am not prepared to hold that the arbitrator was wrong in considering that the objectors were not shown before him to have lost their right to the benefit of the covenants.

In these circumstances it appears to me that there is no course open to me except to dismiss this appeal. I cannot refrain from noticing that the award is framed in the form authorised by the rules, and it is so framed that the applicants do not take what is awarded to them except on paying compensation. If the applicants want, they can abstain from paying the £200 to their neighbours and can leave them to bring an action. That is how the matter stands. But as far as the appeal before me goes, it must be dismissed and with the usual result that the appellants must pay the respondents' costs. But the award will be amended by

extending the time for payment of the two sums of £200 from July 31 to Aug. 15.

Solicitors : *H. W. Clarkson, Wright & Co.* (for the appellants) ; *Vivash Robinson & Co.* (for the respondents).

[Reported by C. M. YOUNG, Barrister-at-Law.]

HAYES BRIDGE ESTATE v. PORTMAN BUILDING SOCIETY.

[CHANCERY DIVISION (Clauson, J.), July 17, 20, 21, 1936.]

Building Societies—Security on which advance may be made—Loan secured by first mortgage—Second mortgage as collateral security—Validity of second mortgage—Consolidation.

An estate company in respect of two separate advances for the purposes of one building estate mortgaged two separate sets of plots of that estate with a building society. It further secured each advance by a collateral charge. These collateral charges were second mortgages and each contained a clause stating that the Law of Property Act, 1925, s. 93, should apply to the charge. It was most probable that it was intended that that clause was intended to negative such application. The estate company had executed another mortgage with the same society in respect of quite different land and the society, not being satisfied with the security in this case, refused to allow the collateral mortgages to be released unless this third mortgage was also redeemed. It was contended that as the society was forbidden by statute to lend money on the security of a second mortgage, the collateral mortgages were invalid and inoperative :—

HELD : (i) the Building Societies Act, 1894, s. 13, forbidding an advance on land subject to a prior mortgage does not make void a second mortgage where the society already has a first mortgage as security for the same debt. The society can fortify its position by taking a second mortgage.

(ii) the collateral mortgage being good, the society was entitled in the circumstances to consolidate this mortgage with the third mortgage and to refuse to redeem unless the debts outstanding under both mortgages were satisfied in full.

Consideration of a verbal collateral agreement to release houses from a mortgage upon payment of £400 upon the sale of each house.

[EDITORIAL NOTE. There is a well known statutory prohibition against building societies lending money on other than a first mortgage of land. In this case a society took a first mortgage on land A. and as collateral security for the same debt a second mortgage on land B. The contention that the second mortgage was rendered void by the statute was negatived, as the intention of the statute was to protect the society and not to take away from it any security that it had.

AS TO SECURITY ON WHICH ADVANCES MAY BE MADE BY A BUILDING SOCIETY, see HALSBURY, Hailsham Edn., Vol. 3, p. 410, para. 775; and FOR CASES, see DIGEST, Vol. 7, pp. 472, 473, Nos. 112–116.]

Cases referred to :

- (1) *Cummins v. Fletcher* (1880), 14 Ch. D. 699; 7 Digest 480, 155.
- (2) *Portsea Island Building Society v. Barclay*, [1895] 2 Ch. 298; 7 Digest 472, 113.
- (3) *Simons v. Associated Furnishers, Ltd.*, [1931] 1 Ch. 379; Digest Supp.

- (4) *De Lassalle v. Guildford*, [1901] 2 K.B. 215; 17 Digest 346, 1576.
- (5) *Henderson v. Arthur*, [1907] 1 K.B. 10; 17 Digest 345, 1562.
- (6) *Auld v. Glasgow Working Men's Building Society* (1887), 12 App. Cas. 197; 7 Digest 456, 13.

ACTION for a declaration as to rights of redemption of mortgaged property and for damages.

On Oct. 8, 1932, the plaintiff company borrowed money on mortgage from the defendant society. On the same date, the plaintiff company gave a collateral charge to the defendant society as further security. On Jan. 5, 1933, the plaintiff company borrowed from the defendant society a further sum on mortgage and also gave, in the same manner, a collateral charge as further security. A verbal agreement was entered into on behalf of the mortgagor and mortgagee, that the houses comprised in the above mentioned mortgages should be released from the mortgage, as and when they were respectively sold, on payment by the mortgagor to the mortgagee of £400 per house, together with interest and costs.

The plaintiff company brought this action to obtain a declaration that they had a right to redeem any house comprised in the above mentioned mortgages without the defendant society being able to consolidate with any other security. The plaintiff company also claimed damages for breach of contract by reason of the defendant society having refused to release to them certain of the houses comprised in the above named mortgages, notwithstanding that the mortgagor had made due tender of a sum sufficient to entitle them to redeem.

The defendant society claimed to consolidate the mortgages and charges, which the plaintiff company sought to redeem, with other mortgages and legal charges on which principal moneys were still owing. They also denied that the plaintiff company had suffered any damage.

The plaintiff company also alleged that the legal charges referred to being second mortgages were securities which the defendant society were by statute prohibited from accepting and asked for a declaration that such legal charges were invalid and inoperative.

J. N. Daynes, K.C., and *A. T. Denning*, for the plaintiff company: The Building Societies Act, 1894, s. 13, prohibits any advance on a second mortgage and a prohibited transaction is *ultra vires*. This is a transaction which the society could not properly enter into, and if the court came to the conclusion that it was forbidden by sect. 13, it would fall *in toto*. It had been agreed also by a collateral agreement that £400 should be repaid on each of the houses mortgaged being sold, and that any such house should be released from the mortgage. There was a legal right to redeem on the collateral bargain. [Counsel referred to *Portsea Island Building Society v. Barclay* (2), *Simons v. Associated Furnishers, Ltd.* (3), *Cummins v. Fletcher* (1).]

Wynn Parry, K.C., and *C. Montgomery White*, for the defendant society: There is no collateral agreement as alleged by the plaintiff company—that is, an agreement involving the right of the society to consolidate. At the most, it is only an agreement to release each plot, as each house is sold, on payment of £400, without prejudice to all the rights of the society as mortgagees. Even if the collateral agreement is proved, as evidenced by the plaintiff company, the evidence thereof is inadmissible in so far as that agreement limits the society's rights of consolidation, because the collateral agreement deals with a term of the transaction and cannot exist as a separate part. It is inconsistent with the provisions of the mortgage. At the most, the collateral agreement is an agreement to release the houses under the mortgage on payment of £400 per house, and it has not provided for the release of the land charged by the collateral charge. The mortgages, including the three mortgages, contain a legal right to insist on consolidation on which the defendant society is entitled to insist as a term of re-conveyance. In any event, by reason of the failure of the plaintiff company to make punctual payments in accordance with the provisions of the mortgages, the right of the plaintiff company is only an equitable right and not a legal right to redeem and such right is therefore subject to the doctrine of consolidation. Clause 4 of the legal charge could not possibly affect this, because, by the Law of Property Act, s. 93, the right of consolidation remains where any of the documents indicate that the section is not to apply. Such an indication is found in all the mortgages in this case. The right of redemption under the legal charge is only an equitable right. In any event, in this particular case, by reason of clause 2 of the legal charge, there can be no higher right to redeem than that provided by the mortgage documents. On their true construction, the rules of the society contemplate and admit the principle of consolidation. Even if this is not so, a borrower from the society could enter into a mortgage transaction with the society, under which he accepts, as a term of the bargain, the right of the society to consolidate. The effect of the Building Societies Act, 1894, s. 13, is not to make an advance on a second mortgage a nullity, but only to make the directors liable for the loss, if any, occasioned by such a transaction. The *Portsea* case (2) is distinguishable from the present case for that case only decided that the liberating of the society's first mortgage was a nullity and could not be relied upon against the society. [Counsel referred to *De Lassalle v. Guildford* (4), *Henderson v. Arthur* (5), *Portsea Island Building Society v. Barclay* (2), *Auld v. Glasgow Working Men's Building Society* (6).]

Daynes, K.C., in reply: There is a question as to whether anything remains under the consolidating clauses. As regards the exact provision for consolidation, it is suggested that the agreement for consolidation goes on what is strictly called equitable consolidation. The

term consolidation arose from the saying that if one seeks equity one must do equity, and if one wants to redeem one mortgage, one must redeem all the others. There is a question as to how far the right to consolidate conflicts with the rules. The provisions in the rules are required to be there by statute (Building Societies Act, 1874, s. 16; Building Societies Act, 1894, s. 1). It does not matter under which Act the rules come. There must be a provision for redemption in the rules because it is the policy of the legislature that borrowers should know what their rights of redemption are.

With regard to the collateral charges, the same argument applies as to the principal mortgage. With regard to sect. 13 of the Act of 1894, it had been said that the sanction was contained in subsect. (3). It was also said that the plaintiff company were coming to the court to set aside the mortgage and it was not the building society which was seeking to set it aside. But it is not such a case. It is *ultra vires*, and what is *ultra vires* is a nullity. Any party is entitled to come to the court and ask for a declaration as to the true position.

CLAUSON, J. : In the year 1931, the plaintiff company were minded to acquire a certain building estate. The plaintiff company got into touch with the defendant building society and arrangements were made that the building society should provide certain finance for the development of the plaintiffs' estate. I shall come in a moment to state the documents which I have to construe. There is, however, this general observation. Whereas in a business sense what was intended to occur, and did occur, was that the building society should provide considerable sums by way of what are called standing mortgages on which interest was to be paid from time to time, the transactions took the unfortunate form of treating the plaintiff company as an ordinary member of the society and the formal documents executed were in the form corresponding to the ordinary building society mortgage. Mr. Wynmalen [principal director of the plaintiff company] in the box expressed the view, and I sympathise entirely with him in the expression, that the documents were rather forms than the true essence of the transaction. The result is that I have to construe, and estimate the result of a number of documents the particular terms of which are not very apt to meet the true financial situation. However, that does not matter; there are the documents and they must be construed.

The matter is further complicated by this. In the case of all these transactions, what was contemplated was that an advance should be made by the building society with reference to a particular block of plots on which houses were to be erected, and it was contemplated that when the house was complete, a member of the public would be found to buy the house. Of course, that member of the public who was going

to buy the house, as is usual in houses of this kind, was going to raise part of the money on mortgage of his ownership of the house and would want a clear title; by some means or other it had to be provided that when a house was sold there should be facilities for taking it out of any charge in favour of the building society, so as to give a clear title to the purchaser. None the less so because it seems to have been contemplated as the usual means in these cases, that in many, if not most cases, that the purchaser would himself finance his bargain by having recourse to the building society. In the documents there is no reference to any arrangement of that sort for releasing individual houses. One complication is that it is alleged that the building society and the plaintiff company made a verbal arrangement, collateral to the formal documents, which did provide for such a release as I have indicated. The evidence on a topic of that kind must always be closely scrutinised. Such an arrangement shows a collateral contract, and if it is proved must, in certain circumstances and with certain limitations, have effect given to it. I must confess that I was disposed to approach the evidence on this part of the case with a critical eye, because it would be affectation to pretend that one is not aware that often a building society in its own interests refuses to pledge itself formally to release a house, although it is contemplated as a matter of business that it should be done, merely to give the building society some hold on the matter so that it may be in some more favourable position to obtain the business which will ensue in financing a purchaser. However, as will be seen, when I state the facts relating to this case, it is a case in which in my view the collateral contract which it is sought to be established has been established. That, however, leads only a small way on to the determination of the questions in this case, for that matter having been dealt with, it remains to deal with the construction of the documents.

With those preliminary observations, I will now deal with the documents which I have to construe. On Oct. 8, 1932, the defendant society provided £4,400, and the plaintiff company mortgaged eleven plots. It will be convenient to call that mortgage A. The mortgage was in the building society's form. That mortgage was supported by what was spoken of as a legal charge of the same date, under which the plaintiff company, by way of collateral security, charged the remainder of its estate at Hayes—where the plots, subject to the first mortgage, known as mortgage A., were situated. This collateral security was by way of second mortgage.

Another transaction was this, and it will be convenient to call it mortgage B. On Jan. 5, 1933, in consideration of £5,600 provided by the defendant building society, the plaintiff company mortgaged fourteen like plots and, in the same way, that mortgage was supported by another collateral charge, which in this case was not only a second charge as being

subject to a first. It was more than that, it was a third charge, because it ranked behind the charge which supported the other mortgage. At all events, it was not a first charge. The trouble is that in connection with some entirely different plots there has been a mortgage or a series of mortgages, which it will be convenient to speak of as the C. mortgage, under which advances had been made by the defendant society to the plaintiff company. The trouble has arisen in this way. The building society would appear not to be entirely satisfied with its security for the C. mortgages, and accordingly sets up the case that these two legal charges, collateral to mortgages A. and B., must be kept on foot (even if all the plots comprised specifically in the A. and B. mortgages are sold and paid for) as further security for the C. block of mortgages. For reasons that one can well understand, that does not suit the plaintiff company, and that is really the main point that matters in the present case.

I turn, before considering the details of the documents, to the present litigation to see what it is. The action started as an action asking for a declaration that the plaintiff company was entitled to redeem the property comprised in mortgage A. and in its supporting legal charge, and the property comprised in mortgage B. and its supporting legal charge, without suffering any consolidation with any other security. There was a claim for damages for breach of contract by the society's refusal to release the mortgages and the legal charges, and there was a claim for costs. The writ was issued on Dec. 19, 1935, and as recently as July 15, 1936, that claim was extended so as to comprise rectification of the mortgages A. and B., by inserting in them a clause providing for the release of the several plots on the occasion of the sale of the plots on payment of £400 per plot, and further claiming a declaration that the legal charges which supported the mortgages A. and B., were invalid and inoperative by reason of rule 14 of the defendant society's rules and by the Building Societies Act, 1894, s. 13. Evidence was given before me, and I think that, the evidence having been given, the facts are now reasonably clear and accepted by both sides. The facts are that there is no evidence at all that the mortgages were otherwise than in the form that the parties intended, and accordingly the claim for rectification must fail. There was, however, an arrangement between the plaintiff company and the building society evidenced by the correspondence relating not only to the particular transaction I have to deal with, but to similar earlier transactions under which it was quite clearly arranged, though it was not put in the deeds, that the plaintiff company should have a right to have every house released from the mortgages and charges as it was sold on payment of £400. It was not expressly provided that it should be £400 with interest up to date. Nothing turns on that, however. It is quite clear that that was the arrangement, and that the

arrangement was not intended to be embodied in the formal documents, but they were executed on the footing that that collateral agreement was to be carried out. It was suggested that I must not regard the collateral agreement because it contradicts the documents. In my view, it does not. If the collateral agreement had in each case been inserted in the document it would not have contradicted the document, although no doubt the operation of the collateral agreement has some modifying effect on the result. I have dealt with that question as an issue of fact before me, and I can now turn to the documents to see what light is to be obtained from them as to the solution of the problem presented to me as regards consolidation. In view of my finding of fact, it appears to me that whatever the contents of the documents may be, the plaintiff company has established a right, not to the declaration asked for in the first clause of their prayer, but to a declaration in the following terms : The plaintiff company is entitled to have a release of the one house comprised in the mortgage of October—which I have called the A. mortgage—not already released, and the six houses in the B. mortgage of Jan., 1933, not already released, upon payment of £400 per house, such houses respectively having been sold.

The effect of that declaration is this. The two mortgages which I have spoken of as A. and B. have both been, so to speak, emptied of their contents. All the houses comprised in each have to be released upon payment of the figure I have mentioned. That still leaves something due, if only for charges and expenses, on the mortgages, which, however, will remain secured, not upon the houses, as they have released, but upon the property comprised in the second charge other than the houses, the material part of that property being what has been spoken of as the undeveloped land.

The problem which I have to solve is whether the plaintiff company can now claim to have those charges released without their paying off at the same time what is payable in respect of the C. block of mortgages. The first point is—it is a point raised by the recent amendment—that these two legal charges are invalid and inoperative because it is obvious if they are invalid and inoperative no further question arises. The point was put in this way. Rule 14 [of the rules of the society] provides that :

No advance shall be made upon any property which shall be mortgaged to any other persons than the society.

That would, of course, preclude second mortgages, and the Building Societies Act, 1894, s. 13, is in these terms :

(1) A society under the Building Societies Acts shall not advance money on the security of any freehold, copyhold, or leasehold estate which is subject to a prior

mortgage, unless the prior mortgage is in favour of the society making the advance.

(3) If any advance is made in contravention of this section, the directors of the society who authorised the advance shall be jointly and severally liable for any loss on the advance occasioned to the society.

Now, it is suggested that if the building society does in fact advance on second mortgage, the result is that the man who has obtained the advance, although he is liable to repay it, is by this rule and by this section relieved, in respect of his property, of the charge which he has attempted to put upon it by the second mortgage. I feel grave doubts whether that is the result. I am disposed to think—although, for the purpose of this case, it is unnecessary to decide—that as well as regards the rule as regards the section the effect is not intended to be a benefit to the person who receives the advance. The object is to protect the interests of the society. It seems a very odd method of protecting the interests of the society that when it makes an advance upon inadequate security, the person to whom the money is advanced should be freed from the obligation of providing the inadequate security and the society is worse off than if it had not attempted to get any security at all.

But, however that may be, neither the rule nor the section applies to this case. What has been done in this case is that the advance has been made both as regards mortgage A. and mortgage B. on the security of a perfectly good first charge. I have no evidence to suggest that that charge is other than such a charge as was perfectly proper for the society to take as a security. The society has taken as further security this second charge. Let us admit for the moment that it would be quite wrong for the society to advance on a second charge alone. Let us admit further, though I do not know whether this is right, that if it did advance on a second charge alone, the second charge would be a nullity. It does not seem to me logical to think that in a case of this kind where an advance has properly been made, there is anything wrong or contrary either to the rule or to the Act, in the society fortifying its position by a second charge. There seems no reason why the society should not be allowed to fortify its position. It is suggested that the view which I take of the section may give rise to an attempt to advance on second mortgage with a delusive or illusory first mortgage and to protect that transaction by saying: It is an advance on first mortgage with a collateral second mortgage. When such a case arises it can be dealt with by the court. That is not this case. For the reasons I have attempted to explain, it is my view that this claim added by amendment that the defendant society is disentitled to rely on these two which are spoken of as collateral charges, by reason of the rule and the section, fails.

I now come to the third part of this rather complicated matter. I have first to make up my mind what the documents mean. The docu-

ments are all in precisely the same form, and I shall take the document which I have spoken of as mortgage A. as the document which I shall construe. My observations will apply to the other one, as it is in precisely the same form. The mortgage is a building society mortgage. In respect of an advance of £4,400 the mortgagor is treated as having the advance in respect of 176 shares and the property is demised to the society for a term of 1,000 years in the way usual since 1925, subject to the following proviso for vacating these presents. That introduces a provision for vacation, which corresponds to the old redemption clause :

Provided always that if the mortgagor should pay to the society all moneys payable by the mortgagor pursuant to the covenant in that behalf hereinafter contained, or shall pay to the society such other moneys as according to the present rules and bye-laws of the society shall be payable for the earlier redemption of the security and shall in all respects conform to the same rules and bye-laws and the covenants herein contained, then the society shall at any time thereafter upon the request and at the cost of the mortgagor endorse upon or annex unto these presents a proper receipt for all moneys intended to be hereby secured.

Then there is a proviso for attorning tenant, which I need not read, and a provision as to entering into possession, which again I need not read. Then comes the covenant by the mortgagor with the society that until the whole of the £4,400, with the premium and interest, shall have been paid by monthly instalments as hereinafter mentioned—the monthly instalments are subsequently mentioned—or until the security has previously been redeemed in accordance with the present rules, he will duly and punctually pay to the society the instalments calculated in the ordinary way to cover ultimately the principal and the interest :

and it is hereby agreed that notwithstanding anything to the contrary contained in any statute now or for the time being in force, the society shall be entitled to consolidate this security with every other security which the society may at any time hold on any other property for any other debt for the time being owing to the society from the mortgagor and that the mortgagor shall not be entitled to redeem this security without at the same time redeeming every other security which the society may then hold on any other property for the time being in mortgage to the society from the mortgagor.

That is mortgage A., and in view of the collateral agreement which I find existed, mortgage A. operating in combination with it agrees that in case any house comprised in it is sold, on payment of £400, the mortgagee is to release it. It is suggested that that covenant in some way contradicts the provisions I have read as regards consolidation and restricting the mortgagor from redeeming the security without redeeming the other securities. In my view, it does not. It is perfectly true that when all the houses have been released from the security they have been released and no provision as to consolidation can apply to a house that has been released from the security. That is inherent in the provision as to the release, and I do not see anything which contra-

dicts this clause as to consolidation in the provision as to the release of the house.

I have read that document with some care, but it will be borne in mind that what I am concerned with is the question as to what are the rights of redeeming the legal charge which was given by way of collateral security in support of that mortgage, and I now turn to the document which creates that charge. It was a deed supplemental to the mortgage of October and recites that upon treaty for the advance of £4,400, it was agreed that the payment thereof with the said premium and interest thereon should be further secured by a charge of the property therein-after mentioned in manner thereafter appearing. Then the deed witnesseth :

The mortgagor, as beneficial owner hereby charges by way of legal mortgage all the property described in the schedule hereto, subject nevertheless to a mortgage dated June 30, 1931, made between the mortgagor of the first part, Henry Wynmalen of the second part and East Acton Brickworks and Estates Co., Ltd., of the third part, with the payment to the society of all principal interest and other moneys secured by the principal mortgage in the instalments and in the manner therein more particularly mentioned.

Then comes this :

All the powers and provisions of the principal mortgage shall apply and extend to the property hereby charged in the same manner as if that property had been included in the principal mortgage.

I understand that to mean that all the provisions I have mentioned, including the provision as to not redeeming the mortgage property without at the same time redeeming other charges, must be treated as read into this document. Clause 3 is as follows :

Nothing herein contained shall affect the rights of redemption of the principal mortgage or the right to exercise the power of sale therein contained.

Then comes this very cryptic provision :

The provisions of the Law of Property Act, 1925, s. 93, shall apply to this charge.

If they had said that they shall not apply, one would know what was meant. It would mean that this is a charge in regard to which the old equitable doctrine of consolidation in any view of the matter would attach. But it says the provisions shall apply to the charge. That seems rather otiose, because after all every section of every Act does apply and you cannot help it applying. It is suggested that the result is that the equitable doctrine of consolidation is not to apply to this charge. But when you look at sect. 93, it is impossible to construe this provision as meaning that, because sect. 93 applies, only if and so far as a contrary intention is not expressed in the mortgage deeds or one of them. I suspect a blunder has been made and the word "not"

has been left out. I do not think it matters, because with the word "not" excluded, this clause is really inoperative, in a deed which contains such very clear provisions linking the redemption of other mortgages with the redemption of this particular charge, as appear in the mortgage A., of October, which are to be read into this mortgage by virtue of clause 3. It will be noted that the mortgage refers to the rules, and I must refer to the rules to see what the operation of that is. It has this interesting operation, that rule 18, by the second paragraph, provides that :

Mortgages by members of the society may be redeemed at any time by the payment of the principal secured by the mortgage, together with all interest and other charges due by the member at the date of redemption, together with an amount equal to three months' interest upon the principal due at the date of redemption.

What is the effect of that upon the mortgage? The effect is this that whereas under the mortgage the mortgagor is only bound to pay off by certain periodical instalments, he has the right, if he likes, to pay off the total amount of his debt at any time by paying an extra three months' interest and that is a very material provision when we come to the operation of the clause which I have read in regard to not redeeming this mortgage without redeeming other charges, because the other charges which I have to deal with in this case which I have called the C. block of mortgages, contain precisely the same provision as the mortgages which I have read and contain precisely the same reference to the rules. Accordingly, if a man comes along and wishes to redeem the legal charge, he is in a position to redeem the C. block of mortgages by virtue of the rules incorporated in that mortgage. Accordingly, there is no difficulty in operating the clause which says that if he comes to redeem the legal charge, he must at the same time redeem all other mortgages. I was referred to a decision in the Court of Appeal, which it was suggested had some bearing upon this matter, namely, *Cummins v. Fletcher* (1). That case dealt with the position where the court was applying, as a matter of equity, the principles of consolidation. It is of no assistance to me in deciding what the relative rights of the parties are as laid down by the documents. In reference to clause 18, I ought to say just a word upon a point which was very ingeniously raised. It was suggested that having regard to the fact that provisions as to terms of advance and so on have, under the statute to be inserted in the rules, I could spell out of these rules a provision that consolidation was not permitted, and that accordingly, in so far as these documents provided for consolidation, they must be treated as inoperative. At least I think that is what it was. The rules are curiously framed, and in that respect they only conform to the ordinary practice of building society rules.

Rule 16, which is stated in the index to have something to do with consolidation, is in these rather odd terms. It provides that :

Whenever the money secured by any mortgage or further charge shall have been paid, all documents of title in the possession of the society, relating to the mortgage or further charge which shall have been so redeemed, shall be given up ; and the society shall, at the request and costs of the member, execute a release of the mortgage or further charge by a receipt in the form set forth in the schedule to the Building Societies Act, 1874, or may reconvey or assure the premises in question as the member may direct. Provided that if there shall be any principal money owing by such member in respect of any other mortgage or further charge, he shall not be entitled to the delivery of such documents without the consent of the board.

That, when read in conjunction with the paragraph of rule 18, which speaks of the right of the members to redeem, it is suggested contradicts any power which the society would otherwise have, to insist upon something in the nature of consolidation. I do not so read it. I think clause 16 was meant to indicate that while it may well be that the society will, in some cases, not insist on consolidation, still when there is another mortgage, the society has a right to retain the documents ; that surely means that they may retain among other documents a mortgage on which they have endorsed a receipt. In other words, though a man has paid off the charge on the first property, his documents are held, and he cannot deal with his property. That seems to me consistent only with the rule that consolidation, so far from being negatived, is recognised as the normal course. That is easily reconcilable with clause 18, when one remembers that in one sense the principal secured on a mortgage where there is a second charge which can be consolidated, which the mortgagee has a right to consolidate with it, is really not an advance on the original mortgage, but on the two, and bearing that in mind, though I do not say the language is by any means clear, I should rather have thought that the rules support rather than negative the suggestion that the society may, in a proper case, insist on consolidation.

Having referred to the rules, I now turn back to the clause which, in the way that I have indicated, must be treated as read into the second charge to see what the rights by contract are between the mortgagor and mortgagee as to redeeming, and claiming a release of the legal charge. The C. mortgages are in this position. The instalments have, as a matter, of fact, been paid up to date. They have been paid, but I do not think there is any dispute that the instalments on the C. mortgages were at one time in arrear. And it is suggested that that concludes the matter. I doubt myself whether it does, certainly in the present case. The C. mortgages are paid up to date ; but the mortgagors in respect of the C. mortgage have a right, by reason of the rule, to pay off the total amount of the debt. In my view the effect on the clause spoken of as the clause relating to consolidation, which has to be read into the legal

charge from the mortgage which it supports, is this : that the mortgagor binds himself not to claim any release of the legal charge unless at the same time he redeems the C. mortgages, as he is empowered to do under the rules. And accordingly in my view on the terms of the documents themselves, the mortgagee is entitled to insist that the legal charge shall not be released except on the terms of the C. mortgages being redeemed at the same time. I may say that this would apply also to the A. mortgage, but for the fact that it must be treated as being emptied of its content by the fact that all but one of the houses have been released and as to the other house the £400 is forthcoming and as I have already held, the mortgagor is entitled to the release of that house upon payment of £400. That has dealt with the necessary points. The points are all covered, I venture to think, by the reasons I have now given. What remains, however, is to deal with the exact relief to which the parties are entitled, and the question of costs.

As regards relief, it seems to me that the plaintiff company is entitled to a declaration that the plaintiff company is entitled to have released the one house in the October mortgage not already released, and a right to have released the six houses in the January mortgage not already released, on payment of £400 per house, such houses respectively having been sold. That will cover, in substance, what is asked for, in a somewhat different form, in clauses 1 and 3 of the prayer. As regards the legal charge, the declaration I must make is this : that the plaintiff company is not entitled to have a release or re-conveyance of the legal charges of Oct. 8, 1932, and of Jan. 5, 1933, without at the same time redeeming the mortgages referred to in paras. 9 and 10 of the defence, that is, those I have spoken of as block C. mortgages. I think that the claim for damages for breach of contract has vanished. There must be an inquiry as to the loss, if any, by reason of the failure of the defendant society to release the one house in the October mortgage and the six houses in the January mortgage, with liberty to apply. I must dismiss the action in so far as rectification is claimed, or a declaration is claimed that the legal charges are invalid and inoperative. No objection has been taken that there has been no offer to redeem. My relief must stop there. The only other question is the costs. The plaintiff should pay half the defendants' costs.

Solicitors : *Summerhays & Co.* (for the plaintiff company) ; *Hewlett & Co.* (for the defendant society).

[Reported by W. K. SCRIVENER, ESQ., Barrister-at-Law.]

ANDREAE v. SELFRIDGE & COMPANY, LTD.

[CHANCERY DIVISION (Bennett, J.), July 14, 15, 16, 17, 21, 22, 23, 24, 28, 1936.]

Nuisance—Noise—Rebuilding operations—Lease reserving rights of rebuilding adjacent property—Contracting out of remedy.

The plaintiff was the occupier of an hotel under a lease containing the following words as part of the demise: "subject to all rights and easements appertaining to any of the adjacent property and the alteration or rebuilding thereof without any claim by the lessee for compensation for injury upon such plans and elevations as [the lessor] may determine."

In 1931 the defendants bought the residue of the plaintiff's term under that lease subject to a special condition that the plaintiff was until Sept. 29, 1936, to be the defendants' tenant of the premises upon the same terms and conditions as those contained in the lease. The purchase price was paid as to £4,750 in 1931 and a balance of £10,000 was to be paid on Sept. 29, 1936. The property demised by the lease was situated on the northern side of an island site and in 1932 the defendants proceeded to demolish the buildings on the south east corner of that site and to build new buildings thereon. For the purpose of excavating the site the contractors used navvies operated by petrol engines and for the purposes of rebuilding they used mechanical concrete mixers similarly operated. The new building was a steel frame building and the process of riveting the frame together caused continual noise.

In July, 1932, the plaintiff complained that her business had been seriously interfered with by the demolition and building operations and asked the defendants if they would pay a further instalment of £5,000 of the purchase price of the property at once, the total purchase price to be reduced by £1,400 in consideration of this payment being made before the due date. After negotiation the defendants in fact paid £3,000 and deducted £3,840 from the purchase price remaining payable. It was contended that by this arrangement the plaintiff had contracted out of any right to sue for nuisance caused by the rebuilding operations.

In 1935 the defendants commenced the demolition of the buildings at the south west corner of the site and as these were concrete buildings the contractors used pneumatic hammers. In respect of this demolition the plaintiff complained of a nuisance by noise and by dust and grit:—

HELD: (i) there was nuisance by noise dust and grit and it was no defence that modern methods and proper machines skilfully operated were used, because the defendants had acted with complete disregard to the comfort of their neighbours.

(ii) the clause in the lease as to rebuilding adjacent property did not permit the lessors to create a nuisance in the course of such rebuilding and in any event the greater part of the property here demolished and rebuilt was not adjacent property within the meaning of the clause.

(iii) the arrangement in 1932 for expediting payment of part of the purchase price did not amount to any contracting out or waiver of the plaintiff's rights.

[EDITORIAL NOTE. Apart from the interesting point on the construction of the lease and the subsequent sale agreement, this case deals with the application to modern conditions of the doctrine of nuisance by noise due to demolition and rebuilding. In this case the contractors made use of pneumatic hammers for demolition purposes and also caused considerable noise in riveting together the steel frame of the new buildings. Such work must not be carried on only with the

object of saving expense to the building owner, but consideration must be shown for the social and business requirements of neighbouring owners.

FOR THE LAW ON THE POINT, see HALSBURY, 1st Edn., Vol. 21, Nuisance, pp. 530, 531, paras. 898, 899, and FOR CASES, see DIGEST, Vol. 36, pp. 166-168, Nos. 78-98, and pp. 201, 202, Nos. 428-432.]

Cases referred to :

- (1) *Stump v. Bywater & Sons, Ltd.* (1907), THE BUILDER, July 20, p. 91 ; 36 Digest 202, 430.
- (2) *Harrison v. Southwark & Vauxhall Water Co.*, [1891] 2 Ch. 409 ; 36 Digest 162, 44.
- (3) *Bamford v. Turnley* (1862), 3 B. & S. 66 ; 36 Digest 169, 111.

ACTION for damages for nuisance caused by noise, dust and grit, due to rebuilding operations. The facts and arguments are fully stated in the judgment.

H. B. Vaisey, K.C., and *Laurence Tillard*, for the plaintiff.

Fergus Morton, K.C., and *Roger W. Turnbull*, for the defendants.

BENNETT, J. : This is an action which seems to me to raise a question of some importance, not only to the parties to it, but also to people who are either living or carrying on business near to some site in London, upon which a large building is being erected in accordance with what has been described as up-to-date modern methods of construction. As I understand the defendants' case, it is this : If you have the misfortune to live close to some place upon which a large modern building is being put up, constructed of modern materials and put together by modern methods, no matter what injury you may suffer the law gives you no redress, because you are suffering from what is said to be a mere temporary inconvenience.

The present action arises out of extensive building operations conducted by the defendants, Messrs. Selfridge & Co., Ltd., on the north side of Oxford Street to the north of the stores that they own in that street. The operations are being carried out on an island site which is bounded on the north by Wigmore Street, on the south by Somerset Street, on the east by Duke Street, and on the west by Orchard Street ; and the site occupies an area of something like three and a half acres. The freeholder of the western half of the site is now Captain Berkeley Portman, the tenant for life of the Portman settled estates. I am not quite sure that I know who are the freeholders of the eastern half of the site, but there are some people called Hope Edwards, with whom the defendants have entered into a building agreement, under which they have carried out their building operations in the south east corner of the site.

The plaintiff is the lessee of two houses which are on this island site and which are now known as Nos. 119 and 121, Wigmore Street, and in those two houses since, I think, June, 1924, she has been carrying on

a business under the style of the Wigmore Hotel; and until the year which ended on May 31, 1930, she appears to have been making substantial profits. The plaintiff holds under two leases granted to her predecessor in title, the Authors Hotel Limited, by Viscount Portman, who, in the year 1917, was the tenant for life of the Portman settled estates. The first lease, which is dated Dec. 13, 1917, demised the premises which are now occupied by the plaintiff and which were then known as Nos. 19 and 21, Lower Seymour Street, as shown coloured on the plan drawn on the lease :

subject nevertheless to all rights and easements appertaining to any of the adjacent property and to the alteration or rebuilding thereof without any claim by the lessees for compensation for injury upon such plans and elevations as Viscount Portman or his successors in title may determine, to hold unto the lessees from Dec. 25, 1921, for a term of twenty years thence next ensuing

at the yearly rent of £330. The lease contained the usual covenant by Lord Portman for quiet enjoyment by the lessees. The second lease is a reversionary lease which was granted by Viscount Portman on Dec. 1, 1918, and it extended the term granted by the first lease for a further term of ten years from Dec. 25, 1921, the rent being increased for the last ten years granted by the reversionary lease to £600 per annum.

In 1931 the plaintiff entered into an agreement to sell to the defendants the two houses in question for the residue of the term for which they had been originally leased by Lord Portman. It was an agreement which was entered into at a date subsequent to the date upon which the defendants had entered into a building agreement with Captain Berkeley Portman, who, in 1928, had become the tenant for life of the Portman settled estates. By that agreement, the agreement of Oct. 21, 1931, the plaintiff agreed to sell and the defendants agreed to buy for the sum of £14,750 the leasehold premises known as the Wigmore Hotel, held under the two leases to which I have referred, the defendants paying a deposit of £4,750 on the execution of the agreement and agreeing to pay the residue of the purchase money on Sept. 29, 1936. Clause 3 of the agreement provides as follows :

As from the date of this agreement down to the said Sept. 29, 1936, the vendor shall continue to be the tenant of the purchaser in respect of the premises hereby agreed to be sold at the rent reserved by and upon the terms and conditions contained in the lease save and except that (notwithstanding anything contained in the lease) the vendor shall be at liberty with the previous consent in writing of the purchaser its successors and assigns (such consent not to be unreasonably withheld to an underletting to a respectable and responsible person) and with the previous licence in writing of the superior landlord to underlet the premises for the purposes of and to authorise the user thereof as (a) a hotel or (b) business premises or (c) a social club for any period or periods terminating on or before Sept. 28, 1936.

Therefore the present position is that the plaintiff is in possession of

the hotel Nos. 119 and 121, Wigmore Street, upon the terms of clause 3 of this agreement, and on Sept. 29 of this year the defendants will become entitled to the residue of the terms granted by the two leases to which I have already referred.

Before I leave that document, there is one further matter which I think might conveniently be referred to here. It is a transaction which took place between the plaintiff and the defendants in the month of July, 1932, at a time when the defendants were erecting upon the south east corner of the island site the building which the plaintiff now says was erected with so much noise as to give rise to a nuisance to her and to her guests in the hotel.

On July 5, 1932, she wrote to a Mr. Head, who was the agent for the defendants, a letter in which she said :

As explained to you, my hotel business has suffered very severely since the commencement of Mr. Selfridge's building operations, and I anticipate that this must continue until the new building has been completed. I had no wish to put any difficulty in Mr. Selfridge's way, but the noise became so serious that I felt compelled to instruct my solicitors in the matter. As you know, they have since been in communication with Messrs. Jaques & Co., and this correspondence led to my calling on you this afternoon. In these circumstances I am more anxious than ever to be in a position to make fresh plans for the future without delay, and I would be grateful if Mr. Selfridge would now pay over to me the further sum of £5,000 in further part payment of the purchase money under the contract dated Oct. 31 last. If he would do this it would be of considerable help to me, and I would be willing to agree to the deduction of a further £1,400 in respect of interest on the money now paid, so that the balance outstanding under the contract would be reduced to £3,600. If Mr. Selfridge considers the reduction should be larger I ask him to remember my position and the inconvenience and losses which I have already suffered and will suffer during the remainder of my lease.

To that letter Mr. Head, on behalf of the defendants and I think Mr. Selfridge himself, wrote a letter making a fresh proposal. I do not propose to read the whole of the letter, because it is not material, but the fresh proposal was this :

The advance of a further sum of £3,000 in part payment of the purchase money £10,000 which is due in September, 1936. This £3,000 calculated for four and a quarter years at 6 per cent. compound interest amounts to £3,840, which will leave a balance payable of £6,160. This latter amount will therefore remain payable in 1936. You will see that this proposal is better so far as you are concerned by £160 than the one which was previously suggested. You will understand, however, that this arrangement of repayment will be agreed to by Mr. Selfridge without any admission of liability on his part, but is made simply as an endeavour to make up to you to some extent for the inconvenience which you say in your letter has taken place and is likely to occur in the future.

To that letter the plaintiff's solicitors replied on July 15, 1932, by a letter, in which they stated that their client agreed ; and then following

that, and after making a calculation as regards the interest, the letter went on to say :

It is agreed that this arrangement for prepayment is without any admission of liability on the part of Mr. Selfridge and his company and is made as an endeavour to make up to our client to some extent for the inconvenience which has taken place and is likely to occur in the future. At the same time it is also agreed that the undertakings as regards the work at night will continue in force.

Thereupon Mr. Selfridge, or the defendants, on Sept. 2, 1932, paid to the plaintiff £3,000, and upon the agreement of Oct. 21, 1931, there was endorsed a memorandum in these terms :

It is agreed between the parties that in consideration of the sum of £3,000 paid by the purchaser to the vendor in further part payment of the within mentioned purchase price of £14,750 (the receipt whereof the vendor hereby acknowledges) the sum of £10,000 being at the date hereof the balance of such purchase price payable on the completion of the purchase shall be reduced by the respective sums of £3,000 and £840 so that the amount payable then will be £6,160.

I have read the correspondence and the memorandum at this stage for the purpose of getting out of the case an argument which was put forward, the effect of which was that, by reason of the terms of the two letters of July 5 and July 12, 1932, the plaintiff had contracted herself out of any right to complain of any nuisance that might be caused to her by the defendants in carrying out their building operations on the island site. In my judgment there is no foundation for that argument at all, nor do the letters contain any language which, when fairly construed, can be interpreted as a contract between the plaintiff and the defendants that the plaintiff shall sell her right to complain in consideration of a prepayment at a discount of 6 per cent. compound interest of part of the money which the defendants had contracted to pay her on Sept. 29 of this year.

I have now dealt with the plaintiff's position and, before coming to the facts of the case, there remains the defendants' position to be considered. As I have already said, the defendants have built upon the south east corner of the site under the terms of some agreement which I do not need to refer to between themselves and Hope Edwards. With regard to that part of the site which forms part of the Portman settled estates, namely, the western half, which is shown coloured in green on the key plan to which I have already referred, the defendants entered into an agreement with Captain Berkeley Portman, the present tenant for life of the Portman settled estates, which was dated Nov. 28, 1928, under which agreement, upon the fulfilment of certain conditions which have not yet been fulfilled, they will become entitled to the grant of a lease. The conditions are these : When and so soon as the sum of £40,936 shall have been fully paid, and the defendants shall have caused the several leases and agreements referred to in the second schedule to

the agreement and any existing sub-leases to be duly surrendered to Captain Berkeley Portman, and when the surveyor for the time being of Captain Berkeley Portman shall have certified in writing that the defendants have erected, covered in and completed, upon the land described in the first part of the first schedule the buildings and premises as hereinafter agreed, Captain Berkeley Portman will grant unto the defendants and the defendants will accept and execute a counterpart or counterparts of a lease or leases.

Then clause 10 of that agreement provides that :

The intended lessees [the defendants in this action] shall be at liberty on payment of the said sum of £40,936 and interest as presented by para. 11 hereof to take possession of the premises coloured pink on the said plan subject as to such parts of such premises as are comprised therein respectively to the said indenture of lease and agreements referred to in the second schedule hereto and shall also be entitled as from Sept. 29, 1927, to all rents and the benefit of all other rights and provisions reserved by and contained in the said indentures of lease and agreements referred to in the second schedule hereunder written and shall accordingly be entitled to deal with the lessees and tenants under the said indentures of lease and agreements for the purpose of obtaining vacant possession of the premises comprised therein from such lessees or tenants and to give them notices to quit or determine such leases and tenancies as and when the intended lessees shall think fit. The landlord will at the request and expense of the intended lessees join in giving any such notices or concur with them in taking any steps which may be necessary for recovering any moneys and enforcing any of the provisions of the said leases and agreements as herein authorised but not further or otherwise.

The defendants have not yet been able to acquire all the outstanding leasehold interests, but they have acquired some of them, and in respect of that part of the property which is the subject of the agreement of which they have acquired the leases they are at present in the position of mere licensees.

Now, the plaintiff complains that in the carrying out of the building operations upon the south east corner of the island site the defendants caused a nuisance to her by noise, as the result of which she, in carrying on her business at the Wigmore Hotel, has suffered substantial pecuniary loss, the noise being of such a character as to interfere with the physical comfort of herself and her guests and to drive the guests away from her hotel. She also complains of the nuisance caused by the operations of the defendants in the work of demolition and rebuilding which took place at a later date on the south west corner of the island site, and in respect of that demolition she complains of dust, grit and noise.

The first operation, the operation in the south east corner, began in the early part of 1932, and it was finished in the early part of 1933 ; the second operation began on July 2, 1935, and was in full progress when the plaintiff issued her writ in this action on July 16, 1935.

The only claim in the action is for damages ; there is no claim for an injunction, the reason being, I suppose, that in about two months' time

from now the plaintiff will be vacating the Wigmore Hotel, that being the date upon which the contract of Oct. 21, 1931, falls to be completed.

Now, I think it must always be a little difficult for people to give evidence with respect to a nuisance by noise some four years after the events and the noises of which they complain have been listened to. One has to make up one's mind, I think, in a case like this, whether the case which the plaintiff presents is an honest case or whether it is a case which is put forward simply for the purpose of trying to extract money from the defendants; and, after having heard the plaintiff and the plaintiff's son, making all allowances for the exaggerations of a lady who feels that she has suffered a grievous injury, I am quite satisfied that the case which she has put forward is an honest one and was not put forward merely with a view of extracting from the defendants money for nothing.

In my judgment, in those circumstances, she ought not to be penalised, because she may be in some difficulty with regard to the dates upon which the various noises of which she now complains were actually heard, or may be in a difficulty about describing the noises that she actually heard.

As I have said, the building on the south east corner of this island site began in the early part of the year 1932. The site was excavated to a depth of some fifty or sixty feet after the houses that had been standing upon it had been demolished. Near by that site was a church, St. Thomas's Church, which at or about the same time was being demolished, but not by the defendants, although it was under some arrangement, the nature of which I know not, between the defendants and (I think) the Ecclesiastical Commissioners, that the church was being demolished.

The plaintiff makes no complaint in respect of the noise or dust from the demolition of the church. Her complaint, in respect of what was done in the south east corner of the site is entirely confined to the noise emanating from that. Having excavated this site to a depth of some fifty or sixty feet, they proceeded to cover the floor with concrete and to build concrete retaining walls, and then, in the site so excavated and so made sound, they proceeded to erect a steel framework, consisting of joists, stanchions and girders; and having put the steel framework together, they proceeded to rivet the several pieces together. What the framework was filled in with, I do not know, and I do not think it matters, but this much is perfectly certain, that from Mar., 1932, until Feb., 1933, there was an incessant noise proceeding from the south east corner of this island site where the defendants were conducting what they described as their first operation. It has been proved, as I think, by the evidence of Mr. Day, the plaintiff's son, by the evidence of the plaintiff herself, by the evidence of Miss Cornell, and by the evidence of her housekeeper, a Mrs. Lowe; but I think the witness who did more

to satisfy me that there was emanating from the south east corner of this island site a noise which would interfere and did interfere with the physical comfort of ordinary normal people living in the plaintiff's hotel, was the representative upon the site of the architect, a Mr. Duke.

There were navvies operated by petrol engines engaged in the excavation; there were mechanical concrete mixers operated by petrol engines, two of them, I think, on the site, incessantly from about Feb., 1932, onwards; there were five cranes at least, operating almost daily on this site from Mar., 1932, down to February of the following year; there were for a considerable part of the period employees of Messrs. Dorman Long, who were responsible for erecting the steelwork, putting the steelwork together, first of all not riveting it but bolting it together, using, for the purpose of the bolts being fitted, hammers to hammer the bolts in. Then, as the diaries and site reports show, almost incessantly from the early part of Sept., 1932, until towards the end of Nov., 1932, Messrs. Dorman Long's workmen were engaged in riveting this steel framework together. Anybody who has heard the process of riveting knows what an intolerable noise arises from that process. It was being carried on at a distance, at the nearest point, of 25 to 30 yards from the plaintiff's hotel, and at the furthest point I suppose of a little over 100 yards. As I say, I have no doubt about the nuisance, and I have no doubt about the interference by noise with the physical comfort of the plaintiff and the guests in her hotel as the result of that first building operation on the south east corner of the site.

The second operation, as I have said, began on July 2, 1935, and it began with the demolition by Messrs. Sabey for the defendants of Nos. 16, 17, 18, 19, and 20, Somerset Street, and Nos. 10, 11 and 12, of Orchard Street; and there was the Hotel Somerset on the site of Nos. 6, 7 and 8, Orchard Street, which at this time was gutted and only the fabric of which remained.

The plaintiff complains that the demolition occasioned quantities of dust and grit to enter upon her premises, and that the noise which was occasioned by the demolition which was taking place was intolerable, and that it drove her guests away. In my judgment she has proved beyond question that what the defendants did between July 2, when they started their operations, and July 16, when she issued her writ, was an intolerable nuisance, not only by reason of the dust and grit, but by reason of noise, because they used for the purpose of demolishing part of the buildings which lay at the back of the eastern side of the Somerset Hotel, which were built of concrete, pneumatic hammers, for some hours a day, not for any great length of time and not for a great number of days, but I think for three or four days and for several hours on each day. In addition to the noise caused by the use of the pneumatic hammers, there was of course the noise of the falling masonry and the

noise of all the workmen engaged upon the operation upon this very extensive scale.

Now the question is, has the plaintiff, as a result of that, suffered pecuniary damage? The argument which was put forward on behalf of the defendants by Mr. Morton in the very able speech which he made on their behalf was that there was really no relation between the figures which the plaintiff produced and the acts of the defendants, because, as he pointed out, quite correctly, although for the first four years of the period during which the figures were proved the profits made by the plaintiff were just over £2,000 a year on an average, in 1931, in the year ending on May 31, 1931, there was a drop from £2,136 to £463, and at that time the defendants were doing nothing. Also, in the next year, 1932, when the figures showed a loss of £592, the defendants had only been at work for a very short part of the period covered by those accounts. Now I think everybody knows that there was in this country, at any rate in the autumn of 1931, a financial crisis, and it is reasonable to suppose that coming events cast their shadows before them, and that the diminution in the profits which is shown in the accounts for the year which ended on May 31, 1931, may have been brought about by the financial stringency which became really acute in the autumn of that year. But there has been no other explanation given as to why the profits, which until 1930 had been in the neighbourhood of £2,000, became in 1933 a loss of £102 and in 1934 a profit of £103, and in 1935 a loss of £186, unless it be that the plaintiff had been injured by the defendants' operations. When I take the plaintiff's evidence and the evidence of her witnesses as to the complaints made by the plaintiff's guests, and as to what the defendants were actually doing and as to the noise that was heard, I feel in my own mind no doubt at all but that the plaintiff's trade was seriously injured and that her guests were driven away by the noise emanating from the defendants' operations during the time when they were carrying out those operations on the south east corner of the island site; nor have I any doubt but that what was done in July of 1935 must have prejudiced the plaintiff's trade, although I think the trade had probably not recovered from the blow which it received by the operations carried out in the years 1932 and 1933. In my mind there is no doubt but that, as a result of the nuisance arising from the defendants' operations, the plaintiff has suffered substantial damage.

Now the question is, what is the law? The argument for the defendants was first of all directed to the question of nuisance, and was upon the footing that there was a contractual right between the plaintiff and the defendants which prevented the plaintiff from enforcing her common law rights against the defendants. The second proposition was that the defendants were carrying on works of demolition and rebuilding,

and that they were works of a temporary nature ; and if in carrying out those works they employed methods as good as the methods generally employed by skilful firms in carrying out similar works in this country, and if they used reasonable skill and care, the plaintiff had no remedy. For that they relied upon a number of authorities, including the case which is reported in "The Builder" of *Stump v. Bywater & Sons, Ltd.*, (1), and in particular the judgment of the late VAUGHAN WILLIAMS, J., in *Harrison v. Southwark & Vauxhall Water Co.* (2).

I have no doubt that the defendants employed modern methods, and I have no reason to suppose that in using the machines that they did use they acted otherwise than skilfully ; but they acted with complete disregard, from the outset of their operations, for the comfort of any of their neighbours, as far as I can see. They made no attempt to meet the convenience of the plaintiff ; they only ceased to carry out noisy work at night when the plaintiff complained. There was, as I thought, one very good instance of their behaviour to their neighbours when the mistress of the convent school, which was quite near to the site where they were conducting their operations, complained of the noise on the site, and said that it was very difficult to carry on classes with the continued noise, and asked if the crane and concrete mixers could not be stopped between the hours of 9.30 and 12 noon and 2 o'clock and 4 p.m. She was told that that was impossible, and she was told that that was impossible by Mr. Duke, the architect's representative on the site. Mr. Miller, the architect, was asked why it was impossible, in the course of his cross-examination, and his answer to that was : " Well, in view of the volume of the work, I should say." He was then asked whether it was inconvenient for Messrs. Selfridge, and he said : " Well, I do not think it would be fair for us to close down, having a certain number of men employed on the site, and to stop the work in between a day. It does not appear to me that in carrying on an operation it would be reasonable to keep the men standing idle." I think that that has been the attitude of the defendants throughout : " It was necessary in order that we might save money." I cannot help being reminded of a line I remember in "Paradise Lost" : " So spake the Fiend, and with necessity, the tyrant's plea, excused his devilish deeds." Whatever is necessary in the way of noise in order that they may carry out their operations speedily, and save themselves money, they seem to think that they are entitled by the law of this country to do.

Now I do not think that that is the law. I think the law of England stands to-day as it was laid down by the Exchequer Chamber in *Bamford v. Turnley* (3), and I think I had better read the head-note, which is this :

1. An action lies for a nuisance to the house or land of a person, whenever, taking all the circumstances into consideration, including the nature and extent of the plaintiff's enjoyment before the act complained of, the annoyance is sufficiently

great to amount to a nuisance according to the ordinary rule of law; and this whatever the locality may be where the act complained of is done; and where, on the trial of such an action, it appears that the act complained of was done on the land of the defendant, the jury cannot properly be asked whether the causing of the nuisance was a reasonable use by the defendant of his own land: Per ERLE, C.J., WILLIAMS and KEATING, JJ., and BRAMWELL and WILDE, BB., reversing the decision of the Queen's Bench; POLLOCK, C.B., *dissentiente*. 2. In an action for a nuisance arising from the burning of bricks on the defendant's land near to the plaintiff's house, it appeared that the defendant's land and the land upon which the plaintiff's house stood were portions of an estate which had been sold in lots as building land; and in the particulars it was stated that there was abundance of brick earth and gravel, which, with other advantages, presented an advantageous opportunity of carrying out safe and profitable building operations. Bricks had previously been made on the spot where the plaintiff's house stood. The judge directed the jury that if they thought that the spot was convenient and proper, and the burning of the bricks was, under the circumstances, a reasonable use by the defendant of his own land, the defendant would be entitled to a verdict.

Now, it may have been "reasonable" for the defendants to do what they did do upon these two sites; but BRAMWELL, B., in delivering his judgment in the Exchequer Chamber said, at pp. 82 and 83, dealing with the justification of the defendants:

He says that the nuisance is not to the health of the inhabitants of the plaintiff's house, that it is of a temporary character, and is necessary for the beneficial use of his, the defendant's, land, and that the public good requires he should be entitled to do what he claims to do. The question seems to me to be, Is this a justification in law—and, in order not to make a verbal mistake, I will say—a justification for what is done, or a matter which makes what is done no nuisance? It is to be borne in mind, however, that, in *fact*, the act of the defendant is a nuisance such that it would be actionable if done wantonly or maliciously. The plaintiff, then, has a *prima facie* case. The defendant has infringed the maxim *Sic utere tuo ut alienum non lædas*. Then, what principle or rule of law can he rely on to defend himself? It is clear to my mind that there is some exception to the general application of the maxim mentioned. The instances put during the argument, of burning weeds, emptying cess-pools, making noises during repairs, and other instances which would be nuisances if done wantonly or maliciously, nevertheless may be lawfully done. It cannot be said that such acts are not nuisances, because, by the hypothesis, they are; and it cannot be doubted that, if a person maliciously and without cause made close to a dwelling-house the same offensive smells as may be made in emptying a cess-pool, an action would lie. Nor can these cases be got rid of as extreme cases, because such cases properly test a principle. Nor can it be said that the jury settle such questions by finding there is no nuisance, though there is. For that is to suppose they violate their duty, and that, if they discharged their duty, such matters would be actionable, which I think they could not and ought not to be. There must be, then, some principle on which such cases must be excepted. It seems to me that that principle may be deduced from the character of these cases, and is this, viz., that those acts necessary for the common and ordinary use and occupation of land and houses may be done, if conveniently done, without subjecting those who do them to an action.

Now upon that principle, as it seems to me, you can except from the

general rule *sic utere tuo ut alienum non lædas* the case of the defendant Bywater in the case of *Stump v. Bywater* (1), and you can except from the general principle the acts of the water company in the case of *Harrison v. Southwark & Vauxhall Water Company* (2) and the question that one has to ask oneself, if that be the true principle, is whether what the defendants did, either on the site of the first operation or on the site of the second operation, was done in the ordinary and common use and occupation of land or houses ?

I cannot regard what the defendants did on the site of the first operation as having been commonly done in the ordinary use and occupation of land or houses. It is neither usual nor common, in this country, for people to excavate a site to a depth of 60 ft. and then to erect upon that site a steel framework and fasten the steel frames together with rivets ; nor is it, I think, a common or ordinary use of land, in this country, to act as the defendants did when they were dealing with the site of their second operation, namely, to demolish all the houses that they had to demolish, five or six of them I think, if not more, and to use for the purpose of demolishing them pneumatic hammers. All these acts may be very convenient, but I think that if you build in that kind of way and demolish in that kind of way, and it is proved that when you have demolished in that kind of way and built in that kind of way you have caused pecuniary loss to your neighbour, it is but fair that you should compensate your neighbour for what you have done, rather than that he should suffer.

Therefore, founding myself upon the old maxim *sic utere tuo ut alienum non lædas*, and not being able to find that the defendants have brought themselves within the exception to that maxim as laid down by BRAMWELL, B., I come to the conclusion that in law the defendants are answerable to the plaintiff to compensate her for the pecuniary loss which she has proved that she has suffered as a result of the noise which came from the site of their first operation during the greater part of the year 1933, and as a result of the noise and the dust and the grit which came from the site of their second operation between July 2 and July 16, 1935, when the plaintiff issued her writ.

Then the question is what damages the defendants are to pay, and that is a much more difficult question. It is quite plain that the financial stringency which was prevailing in the years of 1931 and 1932 did effect the plaintiff's trade, and may to some extent have been affecting it in the year 1933 and in the year 1934, in which last year I think probably the result of what the defendants did in 1933 would be most felt by the plaintiff. One has more or less to make a guess at the loss that the plaintiff has sustained, but I take the view that she was struck such a blow in the year 1933 by what the defendants did, and her goodwill was so injured by what the defendants did, that it had not, in 1935, recovered

from the blow. I think that if I award the plaintiff the sum of £4,500 for the damage that she has suffered I shall not be doing the defendants an injustice, and I shall probably be giving the plaintiff full compensation for the loss she has sustained. I therefore find that the amount of damages that she is entitled to recover from the defendants is the sum of £4,500.

There remains the point which was taken with regard to the provision in the lease. The point which was taken was that by the terms of the lease under which the plaintiff holds, she is obliged to put up with any injury that she may sustain by the rebuilding or alteration of the adjacent property. It is a provision which has no application to the rebuilding of the south east corner of the island site, but only refers to the rebuilding upon the adjacent property of Lord Portman or his successors in title, and it might extend to all the properties upon which the defendants conducted their second operation in July, 1935.

The first question upon which I have to make up my mind is what is meant by the words "adjacent property"; and it is important to have in mind the fact that in 1917, when the lease was granted, there was between Lord Portman's property in Wigmore Street and his property in Somerset Street, St. Thomas's Church, the approach from Orchard Street to St. Thomas's Church, and some schools, all of which are shown upon the key plan; and it would not have been possible to pass on the island site from Wigmore Street to Somerset Street without going over the property of somebody else. In view of that fact, in my judgment, the property in Somerset Street on which the demolition work was carried out in July, 1935, was not adjacent property within the meaning of the provision of the lease. I think that the property Nos. 10, 11 and 12 Orchard Street may have been adjacent property, but in my judgment the provision of the lease was never intended to give Lord Portman the freedom to do what he pleased in the way of causing a nuisance to his lessee by rebuilding or altering his adjacent property. I think that upon its true construction it meant what Mr. Vaisey suggested that it meant, namely, that the demise was subject to all rights and easements which appertained to any adjacent property of Lord Portman as it stood at the day when the lease was granted, or which the adjacent property might have when the buildings upon it had been altered or rebuilt in accordance with the plans and elevations determined by Lord Portman or his successors in title. I think that is the true construction of that clause, and it has nothing to do with exonerating the lessor from responsibility for injury caused to his lessee by a nuisance which arises in the course of rebuilding or altering his property; and in my judgment that provision does not afford the defendants any answer to the claim which the plaintiff makes in respect of the nuisance arising out of the second operation in July, 1935.

Judgment for the plaintiff for £4,500 and costs. Stay of execution upon the usual terms if appeal prosecuted with due diligence.

Solicitors: *Boyce, Evans & Sheppard* (for the plaintiff); *Jaques & Co.* (for the defendants).

[Reported by REGINALD TOWNSEND, ESQ, *Barrister-at-Law.*]

HENAGHAN v. REDERIET FORANGIRENE.

[MANCHESTER SUMMER ASSIZES (Lewis, J.), July 16, 20, 1936.]

Negligence—Invitee—Scope of invitation—Stevedore.

Factories and Shops—Regulations—Ships—Lighting—Hatches—Factory and Workshops Act, 1901 (c. 22)—Docks Regulations, 1934, regs. 12 (c), 37 (a).

The plaintiff, employed as a labourer, was assisting in the unloading of timber from the defendants' ship. Having finished unloading one kind of timber, a different skid was required to unload the next kind. It was suggested to the plaintiff that a suitable skid was to be found in the after part of the ship and he proceeded there in search of one. In a badly lighted part of the deck space he fell down an open hatch and was injured. It was contended for the defendants that there was no invitation to the plaintiff to go to the part of the ship where the accident happened. The plaintiff relied upon a breach of the regulations made under the Factory and Workshops Act, 1901, s. 79, namely, that in breach of reg. 12 (c) the deck space was insufficiently lighted and in breach of reg. 37 (a) the hatch was insufficiently fenced. The only fence in the present case was some distance from the hatch and in any event of an insufficient height:—

Held: (i) the plaintiff was an invitee and was entitled to recover.

(ii) in the above reg. 12 (c) "required to proceed" does not necessarily mean ordered to proceed; but includes any place where a workman might properly go for ropes, slings, skids, etc.

(iii) in the above reg. 37 (a) "accessible" means accessible without reasonable let or hindrance and the "fence" is a fence situated in close proximity to a single hatch.

[EDITORIAL NOTE.] In view of the recent decisions the "invitee" point in this case is not without interest, but greater interest attaches to the construction of the regulations made under the Factory and Workshops Act, 1901. In this respect the case must be noted up with the decision in *Hawkins v. Thames Stevedore Co.*, [1936] 2 All E.R. 472; Digest Supp., where the same regulations were considered.

AS TO REGULATIONS OF DOCKS, see HALSBURY, Hailsham Edn., Vol. 14; pp. 619, 620, para. 1174; and FOR CASES, see DIGEST, Vol. 24, pp. 916-919, Nos. 117-138.] Cases referred to:

(1) *Hillen & Pettigrew v. I.C.I. (Alkali), Ltd.*, [1936] A.C. 65; Digest Supp.

(2) *Walker v. Midland Ry. Co.* (1886), 55 L.T. 489; 29 Digest 9, 118.

ACTION for damages for personal injuries received in an accident when unloading s.s. "Irene," of which the defendants were owners, at Birkenhead Docks, on Oct. 18, 1935, when he fell through a bunker hatch from which the cover had been removed and was severely injured.

The plaintiff, John Thomas Henaghan, who was a dock labourer, whilst unloading the "Irene," went into her deck space to get a skid

used for the purpose of loading timber in slings. In the semi-darkness he fell through a bunker hatch, which was open, a distance of eighteen feet.

G. J. Lynskey, K.C., and *H. I. Nelson* for the plaintiff.

F. A. Sellers, K.C., and *F. E. Pritchard* for the defendants.

Lynskey, K.C. : It was necessary and incidental to the discharge of the cargo that the plaintiff should go into any part of the ship to which his duties induced him to go ; the space where the accident happened was such a part.

Sellers, K.C. : The plaintiff was a trespasser. His duties did not require him to go there. There was contributory negligence on his part, and this is a defence to breach of statutory duty.

LEWIS, J. : On Oct. 18, 1935, the plaintiff, John Thomas Henaghan, who was a dock labourer and at the material time was employed by Messrs. W. W. Boase & Co., stevedores, fell down one of the bunker hatches of the s.s. "Irene" into the hold and thereby received serious injuries. The s.s. "Irene," of which the defendants are the owners, was then lying at the east float, Birkenhead. She had come into Liverpool and had commenced discharging there on Monday, Oct. 14, the discharging being in the hands of Messrs. W. W. Boase & Co., the employers of the plaintiff. The s.s. "Irene" was loaded with a timber cargo which was stowed both in her holds, on the deck and in the deck space. The vessel is so constructed as to have about amidships deck space for the carriage of cargo, and in this deck space there are hatches for the bunkerholds. Above this deck space there are two alleyways leading fore and aft, and above these alleyways there is a navigating bridge. The deck space is covered in on both sides and for'ard there runs a bulkhead with two apertures in it looking for'ard through which a man could get with difficulty. There is a similar bulkhead at the aft end of the deck space, but that bulkhead has two openings to permit entry into this deck space. These two openings are close to the ladders which lead down to the after deck from the alleyways. These openings can be wholly closed by fitting in boards placed edgeways one on top of the other, completely blocking the entrance into the deck space. In the deck space there are on either side two small hatches leading to the bunkers, and in the centre of the deck space between these two sets of hatches there is the engine-room casing. Access can be obtained to the deck space from below by way of the engine-room. For'ard of the engine-room casing there is another and larger hatch, and for'ard of that hatch and between that hatch and the for'ard bulkhead there is a tank. There is a space between this for'ard bunker hatch and the tank of 1 ft. 2 ins., this space between the bunker hatch and the tank being somewhat hampered by two stanchions. It was down this bunker hatch that the plaintiff

fell and injured himself. The hold into which this hatch leads is a hold exceeding 5 ft. in depth measured from the level of the deck in which the hatch is situated to the bottom of the hold, and the coamings of this hatch are less than 2 ft. 6 ins. in height.

The unloading of this ship commenced at Liverpool on Monday, Oct. 14, when the cargo on the for'ard deck was dealt with, and by noon on Wednesday, Oct. 16, the cargo on the fore deck had been cleared, some portions of the cargo on the after deck and all the cargo in the deck space. Some of the cargo was for discharge at Birkenhead, and the vessel moved across to Birkenhead on the evening of Wednesday. On Thursday the discharge continued and work was commenced on No. 2 hold. The plaintiff with others in his gang were engaged in discharging floor boards from No. 2 hold and loading them into a sling by which the boards were passed ashore. At about 4.25 p.m. on the Thursday they came to the end of the floor boards and reached timber of another description, namely, bundles of slating laths, which bundles were tied round with wire or string. In order to load the timber into the sling it was necessary to be provided with what are known as skids, which are in fact merely pieces of wood. The skids which had been used for loading the floor boards in the sling were entirely useless owing to their size for the loading of the bundles of laths. Efforts to use these skids to load the bundles were found to be quite useless, and an effort was made to load the bundles without any skids at all, but the result of this was that a great many of the bundles got crushed and, as one of the witnesses said, "We were crushing more bundles than we were discharging." What was required was skids of a different size, but apparently as the men knocked off and were to be clear by 5 o'clock, no effort was made to find skids of a proper size that afternoon.

I am quite satisfied that there were no skids of the proper size either on the fore deck or in No. 2 hold. If such skids had been available in either of these places, I can see no possible reason for their not having been utilised. On Friday morning, when work was resumed at 8 o'clock, the plaintiff assisted in the fixing of guys and had a conversation with the hatchmen. In consequence of that conversation the plaintiff went to look for a skid of a suitable size in one of the alleyways, but was unable to find one. In fact there had been lying in the deck space after the discharge on Wednesday skids of a suitable size and the plaintiff having failed to find one in the alleyway, proceeded to the after deck where there was still a considerable quantity of deck cargo. Immediately opposite the openings in the after bulkhead, to which I have referred, the deck cargo had been cleared away, but deck cargo was still up against the bulkhead at the side of the entrance. The plaintiff came down the ladder, stepped on to the deck cargo, and from there on to the top of the partition which had been put up to a certain height across both entrances.

He then stepped inside the deck space. He walked along the deck space, passing two of the smaller hatches, which were closed, and he turned to pass between the engine-room casing and the tank. To do this he would have to step upon the hatch owing to the restricted space. On the Wednesday, when he had been employed in discharging the cargo in the deck space, he had on many occasions passed over the hatch which was then, of course, closed. On this occasion the hatch was open and the plaintiff fell down it and remembers no more until he found himself in hospital. The deck space was not lighted artificially, and the only light in the deck space was afforded by the two openings in the for'ard bulkhead, and the openings through one of which the plaintiff had passed in the after bulkhead. It was a dull morning and although the deck space was not in complete darkness, the light was bad. The captain stated, and I accept his evidence, that all the bunker hatches—five in number—in the deck space were opened on the Wednesday after the stevedores had finished discharging the deck space. He stated that this was done because they expected to coal. No definite arrangement for coaling had in fact been made, and in fact no coaling took place until the following Tuesday night. It would take no more than half an hour to open each of the five hatches, and the smaller hatches can be opened and closed in five minutes. I am of opinion that all the hatches were opened on the orders of the captain on the Wednesday and that as no coaling was done at once, the four smaller hatches were closed and were closed on the morning of the plaintiff's accident. The one hatch which was left open undoubtedly constituted a danger and a trap of which the plaintiff was not aware.

The defence of the defendants to the claim was in effect that the plaintiff was a trespasser on that Friday morning in the deck space, and that although he was an invitee in respect of those parts of the vessel in which his work of discharging still lay, he ceased to be an invitee with regard to the deck space when he had finished discharging that deck space, and that immediately after that deck space was discharged the deck space was out of bounds. I find as a fact that all those concerned, namely, those in charge of the stevedores, and the master and crew of the vessel, were perfectly well aware that the stevedores used this deck space at all times when employed in discharging a vessel not only for shelter in the case of bad weather, but that they frequently had their dinner under cover of the deck space and used the deck space for keeping their ropes and slings and pieces of wood for use as skids. I do not accept the evidence given by the master of the vessel or the representative of Messrs. Boase, who denied all knowledge of this practice.

My attention was called to the case of *Hillen & Pettigrew v. I.C.I.*

(*Alkali*), Ltd. (1). In that case the facts as appears from the headnote were :

The appellants were members of a stevedores' gang employed to load a steamship from the respondents' barge "*Hibernia*." The cargo in the hold of the barge consisted of bicarbonate of soda in bags and soda in kegs on top of the bags. The foreman required the bags to be loaded before the kegs. The kegs were therefore laid along the deck of the barge to enable the bags to be slung on board the steamer by the ship's derricks. After this had been done the crew of the barge replaced the hatch covers on the after portion of the hatch unsupported by the fore and aft beam. The engineer threw a sling on one of the hatch covers and the appellants placed seven kegs in the sling. When they were moving the eighth keg the hatch covers gave way and the appellants fell into the hold and were injured. The men knew that it was dangerous and improper to load cargo off the hatch covers—

Held, that the appellants had no cause of action against the respondents, because :

(1) The crew of the "*Hibernia*" had no authority to invite the appellants to use the hatch covers for the purpose for which, or in the way in which, they were used;

(2) consequently, the appellants in so using the hatch covers were trespassers, and not invitees of the respondents ;

(3) that, even if they were invitees, they were guilty of contributory negligence.

Reliance was placed by Mr. Sellers, who appeared for the defendants, on that case, and in particular to the passage in the opinion of LORD ATKIN, at p. 69, as follows :

My Lords, in my opinion this duty to an invitee only extends so long as and so far as the invitee is making what can reasonably be contemplated as an ordinary and reasonable use of the premises by the invitee for the purposes for which he had been invited. He is not invited to use any part of the premises for purposes which he knows are wrongfully dangerous and constitute an improper use. As SCRUTTON, L.J., has pointedly said : "When you invite a person into your house to use the staircase you do not invite him to slide down the banisters." So far as he sets foot on so much of the premises as lie outside the invitation or uses them for purposes which are alien to the invitation he is not an invitee but a trespasser, and his rights must be determined accordingly. In the present case the stevedores knew that they ought not to use the covered hatch in order to load cargo from it ; for them for such a purpose it was out of bounds ; they were trespassers. The defendants had no reason to contemplate such a use ; they had no duty to take any care that the hatch when covered was safe for such a use ; they had no duty to warn anyone that it was not fit for such use. I know of no duty to a trespasser owed by the occupier of the land other than, when the trespasser is known to be present, to abstain from doing an act which if done carelessly must reasonably be contemplated as likely to injure him, and, of course, to abstain from doing acts which are intended to injure him. The owners of the barge therefore were not guilty of any breach of duty to the plaintiff.

In my opinion that case is clearly distinguishable from the present. The deck space was an area in which undoubtedly the stevedores were entitled to go to discharge, and although the discharging of the deck space was finished, I do not think that a stevedore who was still employed in discharging in the immediate vicinity of that deck space became a trespasser in the deck space. I am satisfied that the stevedores did not

know that they ought not to use the deck space ; that the defendants and their servants, namely, the master and crew of the s.s. " Irene," knew that this deck space was used so long as the stevedores were discharging any part of the cargo in any part of the ship ; that they had every reason to contemplate that the stevedores would use this deck space for the purpose to which I have referred, and that therefore the plaintiff, when he went into that deck space on the Friday morning, was not a trespasser. He did not know that this hatch cover was open, and there was no reason why he should have suspected that it would be open. As I have said, the hatch through which he fell was situated in a place between the engine-room casing and the tank in shadow, in a place in which such light as entered the deck space through the openings above mentioned would but faintly fall.

Reference was also made to the well known case of *Walker v. Midland Ry. Co.* (2). That case is in my opinion clearly distinguishable from the present. The House of Lords there held that there was no evidence of negligence on the part of the respondents, and, as appears from the headnote, the proposition laid down by the House of Lords in that case was as follows :

The general duty of an innkeeper to take proper care for the safety of his guests does not extend to every room in his house, at all hours of night or day, but must be limited to those places into which guests may be reasonably supposed to be likely to go, in a reasonable belief that they are entitled or invited to do so.

Applying this proposition to the facts of the present case, I am satisfied that in the circumstances of this case the deck space of the vessel is a place to which a stevedore may be expected to be likely to go, in a reasonable belief he would be entitled to do so. There was no evidence that any stevedore in the circumstances of this case had ever been stopped or prevented from entering the deck space and no order had ever been given to the effect that they were not to do so. No means or no efficient measures had been taken by the defendants to indicate that the deck space was out of bounds.

It was contended that the fact that the entrances in the after bulkhead which led to the deck space were blocked up with boards showed that the deck space had been placed out of bounds, and a considerable amount of evidence was given as to the extent to which those openings had been blocked up. The evidence on this point was conflicting, but I am satisfied that the openings were not blocked up to the extent deposed to by the witnesses for the defendants, or sufficiently to show that no one was to enter the deck space. The evidence was that the method of completely shutting in the deck space was by the insertion edge to edge of three pieces of board. The lower one of these boards rested upon a narrower piece of board which was cemented into the deck. This lower piece of board projected 9 inches above the deck and was fixed obviously for the

purpose of keeping water from the deck running into the deck space. The piece of board placed upon this fixed piece was 23 inches deep. Above that there was another piece some 22 inches in depth. The third piece filled up the remaining space and was some 22 or 23 inches in depth.

The description given by the plaintiff as to how he entered the deck space on the morning in question, a description which coincided with that given by a witness who after the accident went into the deck space to look to see where the plaintiff had fallen, clearly demonstrates to my mind that two out of the three movable pieces of board were not in their position at the time. If they had been, the plaintiff would have had to squeeze through a space of certainly not more than 2 feet in width and would have to pull himself out from the deck to a distance of 4 feet 6 inches in order to squeeze through. The evidence was that by standing on the deck cargo, which was still on the after deck, he would be able to step from the top of the deck cargo to the top edge of the piece of board which was in position, and so down into the deck space, and that the space through which he went was some 4 feet. If the story told by the defendants is true, namely, that there was no deck cargo close up against the opening or the bulkhead in which the opening was and off which deck cargo the plaintiff could have stepped, the manœuvre executed by the plaintiff was, if not impossible, so difficult that I cannot accept the defendants' account.

On the other hand, the story told by the plaintiff is in my view the correct one, that he entered in the way in which he said he did and that the deck cargo was loaded up to perhaps a little above the level of the top of the partition, and that there was no apparent bar to the use by the plaintiff of this entrance to the deck space. The fact is, as I find it, that there was only one of the pieces of board in position, and that was the piece which was 23 inches deep and that the height of the whole partition including the fixed piece at the bottom, was 32 inches.

The plaintiff relied *inter alia* upon two breaches by the defendants of regulations made under the Factory and Workshops Act, 1901, s. 79. The first was reg. 12 which reads :

When the *processes* are being carried on— . . . (c) all parts of the ship to which *persons employed* may be required to proceed in the course of their employment, shall be efficiently lighted.

I am satisfied that this deck space was not efficiently lighted. I am also satisfied that the processes, namely, the unloading, was being carried on on the ship at the time in question, and the only difficulty which I have with regard to this regulation is to determine whether or not the deck space on the date in question was a part of the ship to which the plaintiff, who was a person employed, might be required to proceed in the course of his employment. It is to be observed that reg. 12 covers not only the places in the hold and on the decks where

work is being carried on and the means of access to and from the ship to the shore or from one ship to another, but also other parts of the ship, which denotes that those other parts are not the parts in which actually the workman's work lies. If, however, as I hold to be the fact, the deck space is a space in which a stevedore is in the habit of keeping ropes, slings and skids for the purpose of his work, to the knowledge of the master and crew of the vessel, and in order to carry out his work of loading or discharging it is necessary to get a sling, a rope or a skid, so kept in the deck space, I am of opinion that the deck space is a part of the ship to which a workman may be required to proceed in the course of his employment. I do not take the view that the use of the word "required" means, or necessarily means, ordered.

The other regulation upon which the plaintiff relied was reg. 37 (a). This reads :

If any *hatch* of a hold accessible to any *person employed* and exceeding five feet in depth, measured from the level of the deck in which the hatch is situated to the bottom of the hold, is not in use for the passage of goods, coal or other material, or for the trimming, and the coamings are less than 2 feet 6 inches in height such *hatch* shall either be fenced to a height of 3 feet or be securely covered

There follows a proviso which is not applicable to the present case. There was some discussion as to the meaning of the word "accessible" in this regulation. I think it is obvious that the word is not to be interpreted as meaning a place to which the workman is bound to go in the course of his duty or a place at which his work lies, and I think that it is sufficient for me to say for the purposes of this case that the word "accessible" means capable of access without any reasonable let or hindrance. The deck space in this case was accessible in this sense to the plaintiff. The hatch was open, and owing to the hatch being open the plaintiff met with this accident. The only obstacle (I use the word advisedly, and as a neutral word) in the way of the plaintiff in gaining access to the deck space was a partition 32 inches high over which any active man could easily step.

It was contended by the defendants that this obstacle, which their witnesses said was some 54 inches high, was a fence within the meaning of the regulation. I hold as a fact that if it is a fence within the meaning of the regulation it was not 3 feet high, but I have very grave doubts as to whether this obstacle could be properly termed in any sense a fence within the meaning of the regulation. It is true that the regulation does not lay down the proximity of the fence to the hatch, but I incline to the view that the regulation means that each hatch must be separately fenced. In the present case the barrier, even if it had been to a height of 3 feet, merely fenced off that portion of the deck in which there were no less than five separate hatches in different positions in the deck. Access could be obtained to that portion of the deck by way of the

engine-room, which would have admitted a person to the area in which the hatches were situated and within the so-called fences. If the proper construction of the regulation in this regard is that a fence 3 feet high can be put not protecting each individual hatch, but protecting a large area of deck in which there are hatches and to which area of deck access can be obtained by ways other than over the fence, it seems to me that the regulation is entirely useless for the purpose for which it was intended. I am therefore prepared to hold on the construction of the regulation that even if this barrier had been 3 feet high, which I hold it was not, it would not have been a fence within the meaning of that regulation.

It was contended that the plaintiff was guilty of contributory negligence in acting in the way in which he did in the defective light. I cannot adopt this argument. The question of the light was put in two ways. It was said either that it was negligent to go into a place in which the light was so bad that he could not see, or that if the light was good enough to entitle him to go into the place he ought to have seen that the hatchway was open. I take the view that the particular spot at which this hatch was situated was not well lighted, but that the plaintiff had no reason to suppose that the hatch, which was a bunker hatch, would not be closed as it had been previously, particularly in view of the fact that no warning was given and that the other two hatches which he passed were closed, and there was nothing to indicate that coaling was about to take place. For those reasons I find that the plaintiff is entitled to recover. [His Lordship reviewed the question of damages and gave judgment for £1,200 and costs with a stay of execution upon the usual terms.]

Solicitors: *G. J. Lynskey & Sons*, Liverpool (for the plaintiff); *Bramwell, Clayton & Clayton*, Newcastle-upon-Tyne (for the defendants).

[Reported by M. D. CHORLTON, *Barrister-at-Law*.]

**Re TURNER'S WILL TRUSTS, DISTRICT BANK, LTD. v.
TURNER AND OTHERS.**

[COURT OF APPEAL (Lord Wright, M.R., Romer and Greene, L.JJ.),
June 30, July 1, 30, 1936.]

Will—Contingent interest—No payment to be made to beneficiary until a later age than 21—Statutory provision for payment to beneficiary—Whether subject to contrary direction in will—Trustee Act, 1925 (c. 19), ss. 31, 69 (2).

A testator gave one fifth of the residue of his estate to those children of his son who should be living at his death and should attain or have attained 28 years. He laid down a complete code of maintenance directing the trustees to accumulate the income during the suspense of absolute vesting of any share. At his death three members of the class were living. Two attained 28 years and their shares vested; the third attained 21 after the testator's death, but died a bachelor and intestate at 24. His estate, which was substantial, went to his mother, and his unvested share went to the two surviving members of the class. The accumulated income of his unvested share totalled about £3,000. The Trustee Act, 1925, s. 31 (1) (ii) provides that if a person over 21 has a contingent interest in a fund, the trustees shall pay the income to him, and if this section were held to apply to the income of the unvested share, the accumulated income should have formed part of the deceased's estate. On an originating summons issued by the trustees to decide this question, it was held that the section imposed an imperative trust and did not confer a power. The defendants (the mother and the survivors of the class) appealed:—

HELD: (i) as the Trustee Act, 1925, is a consolidating Act, the legislature could not have intended to change the existing law established by the Law of Property Act, 1922, s. 88, under which the direction to pay over accumulations to the contingent beneficiary was made subject to a contrary direction in the trust instrument.

(ii) the totality of the provision of the Trustee Act, 1925, s. 31, is one of "the powers conferred by this Act" within the meaning of sect. 69 (2), and therefore only applies in the absence of a contrary direction in the instrument.

(iii) the direction contained in sect. 31 (1) (ii) is an essential part of the new statutory power of maintenance and ancillary to it.

[EDITORIAL NOTE. The point here debated has arisen in at least three cases in courts of first instance, and this appeal was brought to test the view of the Court of Appeal. The question at issue is whether the terms of the Trustee Act, 1925, s. 31, are subject to a contrary direction in the will and particularly is this so where the words are "the trustees shall pay . . ." It was contended that sect. 69 (2) related to powers and did not affect sect. 31 (1) (ii), which was in the nature of a statutory trust. In view of the history of the legislation, the court held that sect. 31 ought to be read as subject to sect. 69 (2).

FOR THE LAW ON THE POINT, see HALSBURY, Hailsham Edn., Vol. 14, pp. 352, 353, para. 661; and FOR CASES, see DIGEST Supp., Infants, No. 813a.]

Cases referred to:

- (1) *Re Spencer, Lloyds Bank, Ltd. v. Spencer*, [1935] Ch. 533; Digest Supp.
- (2) *Re Ricarde-Seaver's Will Trusts, Midland Bank Executor and Trustee Co., Ltd. v. Sandbrook*, [1936] 1 All E.R. 580; Digest Supp.
- (3) *Re Dickson, Hill v. Grant* (1885), 29 Ch. D. 331; 28 Digest 249, 1059.
- (4) *Trevanion v. Vivian* (1752), 2 Ves. Sen. 430; 44 Digest 757, 6161.

(5) *Bective v. Hodgson* (1864), 10 H.L. Cas. 656; 44 Digest 741, 5982.

(6) *Re Thatcher's Trusts* (1884), 26 Ch. D. 426; 28 Digest 249, 1057.

(7) *Re Cooper, Cooper v. Cooper*, [1913] 1 Ch. 350; 28 Digest 249, 1060.

APPEAL from a judgment of BENNETT, J., given in the Chancery Division on Jan. 23, 1936.

Robert Turner executed his last will on Dec. 7, 1929, and gave, *inter alia*, one fifth of the residue to such of the children of his late son Charles Henry Turner as should be living at his death, and should then have attained or should thereafter attain the age of 28 years. If any grandchild died without attaining a vested interest and left issue, that issue attaining 21 was to take his share by substitution. The testator made the following provision for maintenance :

I declare that my trustees may apply the whole or such part as they in their discretion shall think fit of the income of the expectant or presumptive share of any grandchild of mine in my residuary estate under the trusts hereinbefore contained for or towards his or her maintenance education or benefit during such time as such grandchild shall be under the age of twenty-eight years whether there is any fund applicable or any person bound by law to provide for such maintenance or education or not and may either themselves so apply the same or may pay the same to the parent or guardians or guardian of such grandchild for the purpose aforesaid without seeing to the application thereof or may pay the same to such grandchild personally if he or she shall have attained the age of twenty-one years.

And shall during the suspense of absolute vesting of any such share accumulate the surplus if any of the income thereof at compound interest by investing the same and the resulting income thereof in any of the investments hereby authorised in augmentation and so as to follow the destination of the share from which the same shall have proceeded but with power to apply any such accumulations in any subsequent year for or towards the maintenance education or benefit of the grandchild for the time being presumptively entitled as aforesaid in the same manner as such accumulations might have been applied had they been income arising from the original share in the then current year.

Provided always that if at the end of twenty-one years from my death any grandchild of mine shall not have attained a vested interest in my residuary estate the trust for accumulation lastly hereinbefore contained shall cease to operate as to the expectant share of such grandchild in any residuary estate and the whole of the income of such share shall thenceforth and until such grandchild shall attain a vested interest be paid to him or her for his or her absolute benefit.

The testator died on Dec. 5, 1931, and his will was proved on Feb. 8, 1932. The District Bank, Ltd. (the plaintiffs) were appointed sole trustee by deed on Apr. 14, 1933.

The testator's son Charles Henry Turner (aforesaid) had four children. Of these, Stanley Heap Turner died a bachelor in the lifetime of the testator. The other three were living when the testator died. Two of them, Robert Heap Turner (a defendant) and Doris Heap Lyons (a defendant), had attained 28 years before the action. The third, Geoffrey Heap Turner, was 21 on Aug. 3, 1931, but died on Nov. 23, 1934, aged 24, a bachelor, and intestate. The plaintiff bank took out

letters of administration of his estate on Feb. 8, 1935. His share—one third of one fifth of the residue—had been invested and all the income had been accumulated, as he did not need it for his maintenance; these accumulations amounted to £3,421 17s. 6d.

The Trustee Act, 1925, s. 31 (1), reads as follows :

(1) Where any property is held by trustees in trust for any person for any interest whatsoever, whether vested or contingent, then, subject to any prior interests or charges affecting that property—

(i) during the infancy of any such person, if his interest so long continues, the trustees may, at their sole discretion, pay to his parent or guardian, if any, or otherwise apply for or towards his maintenance, education, or benefit, the whole or such part, if any, of the income of that property as may, in all the circumstances, be reasonable, whether or not there is—

(a) any other fund applicable to the same purpose; or

(b) any person bound by law to provide for his maintenance or education; and

(ii) if such person on attaining the age of twenty-one years has not a vested interest in such income, the trustees shall thenceforth pay the income of that property and of any accretion thereto under subsect. (2) of this section to him, until he either attains a vested interest therein or dies, or until failure of his interest :

Provided that, in deciding whether the whole or any part of the income of the property is during a minority to be paid or applied for the purposes aforesaid, the trustees shall have regard to the age of the infant and his requirements and generally to the circumstances of the case, and in particular to what other income, if any, is applicable for the same purposes; and where trustees have notice that the income of more than one fund is applicable for those purposes, then, so far as practicable, unless the entire income of the funds is paid or applied as aforesaid or the court otherwise directs, a proportionate part only of the income of each fund shall be so paid or applied.

This section reproduces the Conveyancing Act 1881, s. 42 (7), but without the saving proviso of the old section that the direction was to be subject to a contrary intention expressed in the instrument. The saving proviso appears in the analogous section of the Trustee Act, 1893, and the amending Act of 1922.

The question in this case was whether the income of G. H. Turner's share should have been paid to him from the date of the testator's death instead of being accumulated. If this income should have been paid to him, then the accumulations would after his death form part of his estate for the benefit of his mother Jessie Turner (a defendant), who took on his intestacy. If, on the other hand, the income was properly accumulated, the accumulations would pass, with his unvested share, to the defendants R. H. Turner and Mrs. Lyons, his brother and sister. The effect of adding the accumulations to the estate, which was large, would be to put it into a higher category for the assessment of estate duty, so that the defendant, Mrs. Jessie Turner, although she would receive the accumulations of £3,000 odd, would also have to pay about £26,000

more to the revenue. All defendants were therefore concerned to prove that sect. 31 (1) did not operate to make the accumulations part of G. H. Turner's estate.

This question had been before the courts in two other recent cases. In *Re Spencer* (1) CLAUSON, J., held that the section did not apply, because of the existence of a protective trust which did not carry the intermediate income; otherwise, he said, it would have applied. In *Re Ricarde-Seaver's Will Trusts* (2) LUXMOORE, J., held that, notwithstanding a distinct intention of the testatrix that the income should not go to the beneficiary, the section provided that it must.

On Oct. 26, 1935, the plaintiff bank issued an originating summons calling on the defendants and the Attorney-General to have the question determined. The summons was heard before BENNETT, J., who on Jan. 23, 1936, gave judgment holding that the accumulations formed part of G. H. Turner's estate. He considered that the "shall" of sect. 31 (1) (ii) could not be construed as "may," and that this paragraph created a trust and did not merely confer a power upon the trustees. Sect. 69 (2) did not apply, because it was only concerned with powers. He rejected the argument that para. (ii) was only a corollary to para. (i), and did not apply when the instrument contained a maintenance code sufficiently complete and comprehensive to negative, within the meaning of sect. 69 (2), an intention that the trustees should have recourse to the statutory code. He also declined to regard the contingent interest of R. H. Turner and Mrs. Lyons as prior to the interests of the deceased, G. H. Turner, because they arose at the same time and were of the same nature.

The defendant beneficiaries appealed.

H. B. Vaisey, K.C., and *E. Errington* for the appellants (defendants), Robert Heap Turner and Mrs. Doris Heap Lyons.

W. C. Cleveland-Stevens, K.C., and *C. R. R. Romer* for the appellant (defendant), Mrs. Jessie Turner.

G. E. Timins for the respondent bank.

J. H. Stamp for the Attorney-General.

Vaisey, K.C.: There is no disclaimer; an executor cannot disclaim a legacy coming to his testator from another source. The will contains a positive direction and a clear, complete and lawful scheme of maintenance which provides without the slightest difficulty for all the contingencies. The Trustee Act, 1893, and the amending Act of 1922 lay down throughout, whenever a direction is given, that it shall apply either subject to any definite provision in the instrument under which it might be applicable, or notwithstanding anything contained in the settlement or will. In drafting the Trustee Act, 1925, the draftsman may have thought it would save trouble to put all these saving clauses into an omnibus clause at the end of the Act. Sect. 69 (2) is such a

clause, but it only relates to powers. Sect. 31 (1) (ii), as interpreted by the learned judge, imposes an extraordinary fetter upon the testamentary powers of a testator and makes it almost impossible for him to deprive of income a person who reaches the age of 21 and has a contingent interest. The contemporaneous Law of Property Act, 1925, s. 164, expressly indicates the period during which accumulations may lawfully be made. If para. (ii) has this confiscatory meaning, sect. 164 of the Law of Property Act is rendered largely nugatory, because a testator can never give a contingent interest without the law intervening to give the beneficiary over 21 the whole of the income of the contingent share.

LORD WRIGHT, M.R. : The saving clause has been inserted in all the common law Acts with which I am acquainted.

Vaisey, K.C. : Sect. 69 (2) excludes powers, and all the three learned judges have held that a power is something which implies the exercise of discretion, and that, whereas the first limitation of sect. 31 (1) deals with a power, the second limitation does not. It appears as though, *per incuriam*, the legislature had regarded the whole of sect. 31 as a power. It is for this court to say whether sect. 69 (2) has any effect on sect. 31 (1). Some of the other sections of the Act contain express provisions which appear unnecessary having regard to sect. 69 (2)—e.g., sect. 14, which provides that a receipt in writing of a trustee shall be a sufficient discharge, and which is expressed to apply notwithstanding anything to the contrary contained in the instrument ; also sects. 16, 26 and 27. There is no definition of “ power ” in the Act.

It is a curious position that although a testator may vary the provisions of para. (i), he may make no maintenance provisions to operate after majority. Moreover, he may refuse to have an infant maintained, and then, as soon as the infant reaches 21, the law gives him the income.

Sect. 31 purports to give powers, as is stated in the marginal note. It was intended to enable testators to give discretion to their executors or trustees in order to have infant persons maintained. The words in para. (ii) only apply as a subordinate or ancillary direction in the nature of an administrative provision arising out of para. (i) if para. (i) is applied. It merely continues for a limited time the provision for maintenance which has been inserted in the first instance with particular regard to the period of infancy. It does not apply when the beneficiary reaches majority before the death of the testator. The paragraph, embodied as it is in a section dealing with other matters, ought not to be given the same importance as if it were a separate enactment. “ Prior ” does not mean prior in time of arising, but in interest. The common interests of the class override the individual interests of a member of it.

Cleveland-Stevens, K.C., adopted the argument of *Vaisey, K.C.*, and added : The 1925 Act was a consolidating and not an amending Act.

The court should presume that there is not in this Act such a violent interference with testamentary provisions and with the rights of persons entitled under them as the learned judge has held this paragraph to enact. The intention so to interfere must be expressed in very clear language: *Re Dickson* (3). Most of the provisions of the Act deal, in terms, with trustees' powers. It is natural that while the beneficiary is an infant the trustees should have a discretion over what they are to pay. The legislature may have felt that as soon as he comes of age it is best, in the absence of any express provision in the instrument, to take away the trustees' discretion and enact the fixed rule which will prevent them from being harassed by beneficiaries insisting on having the whole sum. That provision, however, does not unconditionally exclude sect. 69 (2) from operating on para. (i). It would be a striking thing if a testator could "deprive the infant child of bread" and later, when the child was perhaps earning a good living, could not prevent him from having the whole of the income.

The contingent residuary gift carries intermediate income, meaning that the income goes as an accessory to the principal and has to be accumulated: *Trevanion v. Vivian* (4); *Bective v. Hodgson* (5). It is not essential that the income should be distributed in the *corpus* of the principal; that would be a miscarriage of the income. Only as a result of statutory provisions is the income allowed to be diverted from the original trust—e.g., for maintenance. This is not a case where the limitation of the trust carries the intermediate income; the dispositions of the testator make it impossible to say with certainty that the intermediate income will be there when the contingency arises. In the meantime, the trustees are given power to apply the income in such a way that at the end of the period there may be nothing at all more than the original capital. The paragraph therefore does not apply at all. In *Re Spencer* (1) CLAUSON, J., held that it did not apply because, owing to protective trusts and possibilities of forfeiture, it was not possible to forecast with certainty that the intermediate income would necessarily go with the capital.

Stamp: Powers are discretionary; trusts are imperative and obligatory (FARWELL ON POWERS, 3rd Edn., p. 10). The express provisions in the Act precluding testators from varying its terms could be read as powers. In sect. 7 the power to prohibit is no doubt unnecessary, as the draftsman might have relied on sect. 69 (2), but that does not support the proposition that an imperative obligation should be read as a power. The provision in sect. 14 laying down that a trustee's receipt in writing is a valid discharge might in certain circumstances be called a power. Sect. 26 gives a power to trustees to distribute the estate after notices; this is a power, although it cannot be varied by settlors or testators. Sect. 27 also contains a power,

though the operation of sect. 69 (2) is expressly excluded from it. There is a consistent distinction throughout the Act between trusts and powers. The heading to part II: "General powers of trustees and personal representatives" is not enough to label every provision in that part of the Act as a power within the meaning of sect. 69 (2). It does not justify introducing a confusion between powers and imperative directions. The principle of sect. 31 is that the application of an infant's income must be discretionary; it would be a drastic thing for the legislature to enact that the trustees should have discretion but not the testator. When, however, the beneficiary is an adult, the trustees are given the imperative duty of paying the income to him.

This section was embodied in the Law of Property Act, 1922, which never came into force. There, however, the direction was qualified by a subsection which placed all the provisions of the section at the disposition of the testator. Sect. 69 (2) would doubtless cover not only powers but also provisions ancillary to powers. Sect. 31 (1) (ii) is not a part of the general power of maintenance, but is distinct from that power and is merely inserted here for convenience. To say that a power can include something quite ancillary and not part of a power is to break in upon a well-established rule of interpretation. The meaning of the word "power" is well settled. Para. (ii) is not ancillary to para (i) but quite independent of it, and applies to a different time of life. It is plainly imperative and not a power.

The contingent interest carries all the intermediate income subject to any prior interests. The power of the trustee under the will to pay part of the income to the beneficiary may be treated as a prior interest, but if it is not a prior interest it is nothing. It carries the income in the same way as the *corpus* and merely anticipates the time when the beneficiary will take the *corpus* with all its accumulations. The mere fact that some of the income may go out to a third party, and, *a fortiori*, that it may only go out to the contingent legatee himself, has no effect in preventing the section from operating on that balance of the income which is not taken out of the contingency.

The object is that interests shall be *prima facie* vested at the earliest moment and not held in suspense. If the testator is not allowed to make a gift to the child of someone at the age of 28, the beneficiary can have it at once if it is a vested gift. The section puts the income of a contingent gift to an adult in the same position so long as, subject to the contingency, he is the only person interested in it. He is not to be kept out of it until an advanced age if, and so far as, during the whole of that time he is the only person interested.

A trust to accumulate does not show a contrary intention, under the Conveyancing Acts, to cut out the powers of maintenance—hence a trust to accumulate the income of an infant does not oust the statutory power

to maintain the infant. The object of the Acts was not to prevent the infant from being maintained, but to preserve the income for his benefit, and the preservation of the income for his benefit has been held not to be inconsistent with the later application of it for his benefit: *Re Thatcher's Trusts* (6); *Re Cooper* (7).

LORD WRIGHT, M.R.: The judgment which my brother ROMER, L.J., will now read is the judgment of the court.

ROMER, L.J.: By the Trustee Act, 1925, s. 31 (1), it is enacted that where any property is held by trustees in trust for any person for any interest whatsoever, whether vested or contingent, then, subject to any prior interests or charges affecting the property—(i) during the infancy of such person if his interest so long continues, the trustees may pay or apply for his maintenance as therein mentioned the whole or such part of the income of the property as may be reasonable; (ii) if such person on attaining the age of twenty-one years has not a vested interest in such income, the trustees shall thenceforth pay the income of that property and of any accretions thereto under subsect. (2) of this section to him, until he either attains a vested interest therein or dies, or until failure of his interest. Subsect. (2) provides that during the infancy of any such person, if his interest so long continues, the trustees shall accumulate all the residue of that income and hold the accumulations as therein mentioned. Subsect. (3), so far as is material to the present purpose, provides that the section applies in the case of a contingent interest only if the limitation or trust carries the intermediate income of the property. The principal question arising upon this appeal is whether the provisions of para. (ii) of sub-sect. (1), which in terms at any rate are directory, are to prevail in a case where a contrary intention is to be found in the instrument creating the trust.

The facts that give rise to the appeal are as follows: Robert Turner, who died on Dec. 5, 1931, bequeathed a share in his residuary estate to such of the children of his late son Charles Henry Turner as should be living at his death and should then have attained or should thereafter attain the age of 28 years. At the date of the testator's death there were living three children of Charles Henry Turner. Two of these, namely the defendants Robert Heap Turner and Doris Heap Lyons, have attained the age of 28 years. The third child was Geoffrey Heap Turner, who attained 21 on Aug. 3, 1931, but died on Nov. 23, 1934, and accordingly never attained the age of 28. The defendant Jessie Turner is the person beneficially entitled to his estate. Now, the will contained express directions as to how the income of the expectant or presumptive share of any grandchild of the testator was to be dealt with. After giving to his trustees power to apply the whole or such part as they

should think fit of the income of any such share for the maintenance, education or benefit of the grandchild so long as he or she should be under the age of 28 years, the will proceeded as follows :

and shall during the suspense of absolute vesting of any such share accumulate the surplus, if any, of the income thereof at compound interest by investing the same and the resulting income thereof in any of the investments hereby authorised in augmentation and so as to follow the destination of the share from which the same shall have proceeded, but with power to apply any such accumulations in any subsequent year for or towards the maintenance, education or benefit of the grandchild for the time being presumptively entitled as aforesaid in the same manner as such accumulations might have been applied had they been income arising from the original share in the then current year.

Geoffrey Heap Turner, however, had an ample income from other sources, and no part of the income of his presumptive share in the testator's residuary estate was applied by the trustees under the power of maintenance conferred upon them by the will.

In these circumstances the trustees, being apparently of opinion that they were bound to comply with the directions in the will, accumulated the whole income of the share until his death. Such accumulations amounted to over £3,000. Their attention then seems to have been called to the Trustee Act, 1925, s. 31 (1) (ii), with the result that a doubt arose in their minds whether they ought not to have paid the income to Geoffrey Heap Turner instead of accumulating it. If this doubt were well founded, then the £3,000 belonged to his estate. If not, it passed to his brother and sister in equal shares. For the purpose of getting the question decided the District Bank, Ltd., who by that time had become the trustees of the will, and incidentally were also the legal representatives of Geoffrey Heap Turner, instituted these proceedings by originating summons on Oct. 25, 1935. Robert Heap Turner and Doris Heap Lyons were, of course, made defendants, and so was Jessie Turner. But the last thing that Jessie Turner desired was a determination of the question in her favour. Geoffrey Heap Turner had died possessed of a considerable fortune apart from anything coming to him under the will of his grandfather, and in respect of that fortune estate duty at the rate of 30 per cent. and amounting to over £111,000 had become payable. If, however, the income which had been accumulated by the trustees ought to have been paid to him, the rate of duty on his estate would be raised to 32 per cent. and an additional sum of £26,000 or thereabouts would be payable for estate duty. Jessie Turner therefore strenuously supported the claims of Robert Heap Turner and Doris Heap Lyons, and His Majesty's Attorney-General was accordingly made a defendant for the purpose of representing the opposite view.

In these circumstances the summons came on for hearing before BENNETT, J., on Jan. 23, 1936. On behalf of the defendants, other than

the Attorney-General, it was contended that para. (ii) of the subsection in question was inapplicable for the following reason, amongst others. Sect. 69 (2) of the Act is in these terms :

The powers conferred by this Act on trustees are in addition to the powers conferred by the instrument, if any, creating the trust, but those powers, unless otherwise stated, apply if and so far only as a contrary intention is not expressed in the instrument, if any, creating the trust and have effect subject to the terms of that instrument.

Here, it was said, was an express trust for accumulation of the income of the share of a grandchild after attaining the age of 21 and before attaining the age of 28, and that trust must by virtue of sect. 69 (2) prevail over the trust imposed by sect. 31 (1) (ii). To this the Attorney-General by his counsel replied that sect. 69 (2) referred only to the " powers " conferred by the Act, and that the words of para. (ii) were imperative and created a trust and not a mere power.

This was the view that had been taken of the matter by CLAUSON, J., in *Re Spencer* (1), and LUXMOORE, J., in *Re Ricarde-Seaver's Will Trusts* (2). In the former case CLAUSON, J., said this, at p. 540 :

If sect. 31 (1) (ii), dealing with the income of a person who is between the age of twenty-one years and the age when he attained a vested interest in that which is given to him, had been expressed in the form of conferring power on the trustees to maintain him out of the income, that clause would, *prima facie*, having regard to sect. 69 (2) of the Act, not have been available to override the express terms of the instrument creating the trust, in this case the will ; but it seems pretty plain that that subsection does not apply to this clause. Accordingly, it would seem that this clause in sect. 31 has to be applied if the case falls within that section so as to override anything inconsistent with the application of the clause which is to be found in the trust instrument.

In the latter of the two cases LUXMOORE, J., said that sect. 69 (2) had no application to the case before him because sect. 31 did not confer a power on the trustees but imposed on them a statutory duty to pay the income notwithstanding the terms of the will. In the present case BENNETT, J., followed the decision of CLAUSON, J., stating that it entirely accorded with his own view of sect. 31, the provisions in subsect. (1) (ii) of which were trusts and not powers, and that the provisions of sect. 69 (2) were restricted to powers. From this decision two appeals are brought to this court, the one by the defendants R. H. Turner and D. H. Lyons, the other by Jessie Turner. Both in the court below and in this court the appellants relied upon other grounds than the one based upon sect. 69 of the Act. It is unnecessary, however, to allude to these grounds in detail, though a brief reference to them will be made later, as in our judgment the construction that the appellants seek to place upon sect. 69 (2) is the one that should prevail. It has, of course, to be conceded that in terms the subsection refers only to " powers," but it is necessary to ascertain precisely what it is that the legislature intended by that word.

For this purpose it is of importance to observe that the Trustee Act, 1925, is a consolidation Act. It is intituled "An Act to consolidate certain enactments relating to trustees in England and Wales." It is therefore extremely unlikely, to say the least of it, that it effected any substantial change in the pre-existing law. It is indeed common knowledge that the Law of Property Act, 1922, which effected many radical changes in the law of property generally, including the law relating to trusts, was never intended to come into operation but to act merely as a foundation for the subsequent consolidation of the law that was carried into effect by the Trustee Act, 1925, and the other statutes of the same year that are compendiously referred to as the Birkenhead Acts. It is necessary, therefore, to examine the statute law relating to the matters dealt with in the Trustee Act, 1925, s. 31, as it existed at the time that the Act was passed. By the Conveyancing Act, 1881; s. 43 (1), it had been enacted as follows :

Where any property is held by trustees in trust for an infant, either for life, or for any greater interest, and whether absolutely, or contingently on his attaining the age of twenty-one years, or on the occurrence of any event before his attaining that age, the trustees may, at their sole discretion, pay to the infant's parent or guardian, if any, or otherwise apply for or towards the infant's maintenance, education, or benefit, the income of that property, or any part thereof, whether there is any other fund applicable to the same purpose, or any person bound by law to provide for the infant's maintenance or education, or not.

By subsect. (2) the trustees were directed to accumulate the residue of the income and to hold the accumulations for the benefit of the person who should ultimately become entitled to the property from which the same arose. It is to be observed as regards this enactment that it did not apply where the infant's interest was less than a life interest or where vesting was postponed beyond the age of 21 years. The law in these respects was accordingly altered by the Law of Property Act, 1922, though, as already pointed out, the Act never came into operation and was never intended to do so. Now sect. 88 (1) of that Act is for all practical purposes in precisely the same language as sect. 31 (1) of the Trustee Act, 1925. By para. (i) of the subsection the trustees' power of maintenance of an infant was extended so as to apply (subject to any prior interests or charges) whatever might be the infant's interest in the property and whatever might be the contingency on which that interest was to take effect. Trustees would therefore have for the first time statutory power to maintain an infant out of the income of property given to him contingently on attaining the age of 28 years. But a more striking alteration of the law was effected by para. (ii) of the subsection. Under the Act of 1881 a trustee's power of maintenance ceased altogether when the person entitled attained his majority.

The Act of 1922 for the first time provided for the maintenance of a

person contingently entitled to an interest in property after that person had attained 21 and until his interest had become vested. The trustees were in terms directed to pay him the income in question, just as they are in the Trustee Act, 1925, s. 31 (1) (ii). But in sect. 88 of the Act of 1922 there followed a subsection which is of the utmost importance. It is subsect. (6), and is in these terms :

This section applies only if and as far as a contrary intention is not expressed in the instrument, if any, under which the interest arises, and shall have effect subject to the terms of that instrument and to the provisions therein contained.

It is plain, therefore, that when the legislature in 1922 imposed upon trustees for the first time the duty of paying the income to the person contingently entitled from the time when he attains his majority to the time when his interest becomes vested, it did not intend to override any directions or expressions of intention to the contrary contained in the instrument under which such person's interest arises.

But the matter does not rest there. On Dec. 18, 1924, there was passed the Law of Property (Amendment) Act, 1924. Its full title was :

An Act to amend the Law of Property Act, 1922, and the enactments thereby affected, and to facilitate the consolidation of the law relating to conveyancing and property, settled land, trustees, the registration of pending actions, annuities, writs, orders, deeds of arrangement and land charges, the administration of estates, the registration of title to land and university and college estates.

It was passed, as had been the Act of 1922, for the purpose, and in view, of the contemplated consolidation of the law that was in due course effected by the Birkenhead Acts less than four months later and was never intended to come into operation. For the present purpose the material section is the fifth, which was in these terms :

The amendments and provisions, for facilitating the consolidation of the statute law relating to trustees, contained in the fifth schedule to this Act, shall have effect.

The only amendment of sect. 88 of the Act of 1922 to be found in this fifth schedule is one that for the present purpose is immaterial. Subsect. (6) of the section was left untouched, and the intention of the legislature as to the overriding effect of the instrument creating the trust was in 1924 the same as it had been in 1922.

In these circumstances was passed the Trustee Act, 1925, which, with the rest of the Birkenhead Acts, received the royal assent on Apr. 9, 1925, and came into operation on Jan. 1, 1926. This was the date on which it had been enacted that both the Law of Property Act, 1922, and the Amending Act of 1924 were to come into operation, but these Acts, with some small exceptions, were repealed by one or other of the Acts of 1925. In particular the Trustee Act, 1925, repealed sect. 88 of the Act of 1922 and sect. 5 and the fifth schedule of the Act of 1924. These two Acts had served their purpose, which was to make such amendments

in the various branches of law dealt with in the 1925 Acts as the legislature considered ought to be made with a view to its consolidation, and to permit of the Acts of 1925 being merely consolidating statutes. In these circumstances it is incredible that by the Trustee Act, 1925, the legislature intended to change the law still further and in so radical a respect as to make the provisions of sect. 31 (1), (ii) override the provisions of the instrument creating the trust. If it be possible, therefore, sect. 69 (2) of the Act ought to be so construed as to make it consonant with sect. 88 (6) of the Act of 1922. In our opinion the subsection is capable of being so construed. Part II of the Act, in which sect. 31 is to be found, is intituled "General powers of trustees and personal representatives." It is subdivided into "General powers," sects. 12 to 25 inclusive; "Indemnities," sects. 26 to 30 inclusive; and finally "Maintenance, advancement and protective trusts," which consists of sects. 31, 32 and 33. Sect. 31 deals with maintenance, sect. 32 with advancement and sect. 33 with protective trusts.

Now, with the exception of sect. 33 all the sections comprised in the first and last of these sub-headings either confer powers upon trustees expressly or contain provisions ancillary to the exercise of trustees' powers, and correspond with what, when contained in settlements, would be comprehensively referred to by conveyancers as the trustees' powers. This being so, the provisions of sect. 31 may properly be called comprehensively the statutory powers of maintenance, just as those of sect. 32 may properly be called comprehensively the statutory powers of advancement. The fact that sect. 31 contains provisions that are directory is immaterial. Powers of maintenance, in the comprehensive meaning of that term, usually do. Nothing is more common, for instance, than a direction to trustees to accumulate during the minority income not applied in maintenance. Such a direction is merely ancillary to the power of maintenance strictly so called, and may well be regarded as a part of the power of maintenance in its comprehensive sense. Such a direction is indeed contained in the Trustee Act, 1925, s. 31 (2), and is an essential part of the statutory power of maintenance conferred upon trustees by the section. In the same way the direction contained in subsect. (1) (ii) can be regarded as being merely an essential part of the new statutory power. This statutory power of maintenance—that is to say, the totality of the provisions to be found in sect. 31 of the Act—is, in our opinion, one of the "powers conferred by this Act" within the meaning of sect. 69 (2), and therefore only applies if and so far as a contrary intention is not expressed in the instrument creating the trust, and has effect subject to the terms of that instrument.

For these reasons we are of opinion that the accumulations of the income of the presumptive share of Geoffrey Heap Turner made by the trustees did not form part of his estate but accrued by way of addition to the

shares of the defendants Robert Heap Turner and Doris Heap Lyons in the residuary estate of the testator.

It only remains to mention briefly the other contentions advanced on behalf of the appellants. It was said that the provisions of sect. 31 (1) (ii) of the Act only take effect in cases where the provisions of para. (i) have become operative—that is to say, where, at the date of the instrument taking effect, the person in question is under 21 years. This contention is, in our opinion, inconsistent with the plain words of the section and is untenable. The other contention was that the trust in favour of Geoffrey Heap Turner did not carry the intermediate income within the meaning of subsect. (3) of the section. It is sufficient in the circumstances to say that in our opinion this contention is also untenable. Another contention, advanced on behalf of the appellant Jessie Turner, was that the interest of the persons who should ultimately become entitled to the residuary estate in the accumulations of income directed by the will was a prior interest affecting the property within the meaning of sect. 31 (1). The question involved in this contention was adverted to but left undetermined by CLAUSON, J., in *Re Spencer* (1). It is a question of some difficulty upon which we need not express an opinion, for in view of the construction that we have put upon sect. 69 (2) of the Act, the question can never arise again, inasmuch as the direction to accumulate is in any case an expression of a contrary intention within the meaning of that subsection.

In the result, however, both the appeals succeed and a declaration must be made as asked by the notices of appeal. The costs of all parties to the appeals will be taxed as between solicitor and client and paid out of the accumulations.

Solicitors: *Winter & Co.*, agents for *Jackson & Co.*, Rochdale (for all parties other than the Attorney-General); *Solicitor of Inland Revenue* (for the Attorney-General).

[Reported by DEREK H. KITCHIN, Esq., *Barrister-at-Law.*]

JAMES v. COMMONWEALTH OF AUSTRALIA AND STATE OF NEW SOUTH WALES AND OTHERS (INTERVENERS).

[PRIVY COUNCIL (Viscount Hailsham, L.C., Lord Russell of Killowen, Lord Wright, M.R., Sir George Lowndes and Sir Sidney Rowlatt),
May 4, 5, 7, 8, 11, 12, 14, 18, 19, 1936.]

Privy Council—Australia—Freedom of inter-state trade—“ Absolutely free ”—Validity of Dried Fruits Act, 1928-1935, of the Commonwealth Parliament and regulations made thereunder—Commonwealth of Australia Constitution Act, 1900 (c. 12), ss. 51, 92.

Sect. 92 of the Commonwealth constitution enacts that “ trade, commerce and intercourse between the states, whether by means of internal carriage or ocean navigation, shall be absolutely free.” The Dried Fruits Act, 1928-1935, which, in effect, restricts inter-state trade in dried fruits, and regulations made thereunder, impose on the owner or person having dried fruits, as a condition of embarking on inter-state trade at all, the obligation not to market anywhere in Australia determined proportions of his fruits; and obliging him to export such percentage from Australia.

On Feb. 20, 1935, the Commonwealth Minister of State for Commerce, in accordance with the Dried Fruits Act, 1928-1935, and the Dried Fruits (Inter-State) Trade Regulations, determined it to be a condition of the granting of a licence that the licensee should cause to be exported from Australia certain specified proportions of the Australian dried fruits possessed by the licensee. The appellant, a grower and processor of dried fruits in the state of South Australia, whose products had been sold in all the states of Australia, refused to apply for a licence or undertake the prescribed conditions. In consequence his consignments were seized and forfeited, and the railway authorities and shipping companies to whom he tendered his dried fruits for carriage from the State of South Australia to other states refused to take them, in virtue of the prohibitions and penalties imposed under the Act, by reason of the circumstance that the appellant had no licence. On Apr. 11, 1935, the appellant brought the present action, claiming damages in respect of the seizure by the respondents of certain consignments in Apr., 1932, and in June, 1932, and also claiming a declaration that the Dried Fruits Act, 1928-1935 is invalid as contravening sect. 92 of the constitution and that the regulations made thereunder or some part or parts thereof are likewise invalid. The respondents took out a summons to dismiss the claim as an abuse of the process of the court in that the substantial questions had already been litigated between the parties and decided against the appellant in the action *James v. Commonwealth* (20), and the respondents also demurred to the whole of the statement of claim on the grounds in law that the Dried Fruits Act, 1928-1935, and the regulations thereunder, are valid laws of the Commonwealth and that the acts complained of were authorised by the Act or regulations. The High Court, considering themselves bound by previous decisions, dismissed the summons, but allowing the demurrer dismissed the action. On appeal to the Judicial Committee against the decision of the High Court allowing the demurrer:—

Held: (i) sect. 92 applies to the Commonwealth.

(ii) the Dried Fruits Act and regulations are invalid as contravening sect. 92.

(iii) though trade and commerce mean the same thing in sect. 92 as in sect. 51 (1), they do not cover the same area.

(iv) the freedom of inter-state trade provided for by sect. 92 is limited to freedom at the state barrier.

[EDITORIAL NOTE.] The real gist of this case is the construction of the words "absolutely free" in the Commonwealth of Australia Constitution Act, 1900, s. 92, here more generally referred to as sect. 92 of the constitution. This question was left open by their Lordships in *James v. Cowan* (5), and in the present case, apart from the particular matter under review, the construction is confined to general terms on account of the very wide terms which have been used. The freedom covered by the section is defined as freedom as at the frontier, that is, in respect of goods passing into or out of the state. The extent of the freedom is necessarily not finally defined, because restrictions are not now confined to duties and customs, but include many indirect methods of restriction. The judgment of their Lordships includes a valuable review of cases and Acts which are said to have been passed upon the footing that sect. 92 of the constitution did not bind the Commonwealth, and it should be noted that in the opinion of their Lordships, the Dairy Produce Act, 1933-1935, raises exactly the same issue as that raised in this case.

AS TO FEDERAL AND STATE RELATIONS IN THIS RESPECT, see HALSBURY, Hailsham Edn., Vol. 11, pp. 108, 109, paras. 187, 188; and FOR CASES, see DIGEST, Vol. 17, pp. 449, 450, Nos. 187-193, and Supp.]

Cases referred to :

- (1) *McArthur (W. & A.), Ltd. v. Queensland* (1920), 28 C.L.R. 530, 556; Digest Supp.
- (2) *A.-G. for Commonwealth of Australia v. Colonial Sugar Refining Co., Ltd.*, [1914] A.C. 237; 17 Digest 448, 185.
- (3) *R. v. Burah* (1878), 3 App. Cas. 889; 17 Digest 450, 197.
- (4) *British Coal Corpn. v. R.*, [1935] A.C. 500; Digest Supp.
- (5) *James v. Cowan*, [1932] A.C. 542, *revsg.* (1930), 43 C.L.R. 386; Digest Supp.
- (6) *Fox v. Robbins* (1909), 8 C.L.R. 115; 17 Digest 449, *Case* (s).
- (7) *R. v. Smithers, Ex p. Benson* (1912), 16 C.L.R. 99; 2 Digest 193, 540 *v.*
- (8) *New South Wales (State of) v. Commonwealth, etc.* (1915), 20 C.L.R. 54; 17 Digest 447, *Case* (s).
- (9) *Foggitt, Jones & Co., Ltd. v. New South Wales State* (1916), 21 C.L.R. 357; 17 Digest 450, *Case* (t).
- (10) *Duncan v. Queensland State* (1916), 22 C.L.R. 556; 17 Digest 450, *Case* (b).
- (11) *Roughley v. The State of New South Wales, Ex p. Beavis* (1928), 42 C.L.R. 162; Digest Supp.
- (12) *R. v. Vizzard, Ex p. Hill* (1933), 50 C.L.R. 30; Digest Supp.
- (13) *O. Gilpin v. Road Transport Comr. (New South Wales)* (1935), 52 C.L.R. 189; Digest Supp.
- (14) *Willard v. Rawson* (1933), 48 C.L.R. 316; Digest Supp.
- (15) *Peanut Board v. Rockhampton Harbour Board* (1933), 48 C.L.R. 266.
- (16) *Vacuum Oil Co. Proprietary, Ltd. v. State of Queensland* (1934), 51 C.L.R. 108; Digest Supp.
- (17) *Ex p. Nelson (No. 1)* (1928), 42 C.L.R. 209; Digest Supp.
- (18) *State of Tasmania v. State of Victoria* (1935), 52 C.L.R. 157; Digest Supp.
- (19) *Huddart Parker, Ltd. v. Commonwealth* (1931), 44 C.L.R. 492; Digest Supp.
- (20) *James v. The Commonwealth of Australia* (1929), 41 C.L.R. 442; Digest Supp.
- (21) *Colonial Sugar Refining Co., Ltd. v. Irving*, [1906] A.C. 360; 17 Digest 447, 183.
- (22) *Commonwealth & Commonwealth Oil Refineries, Ltd. v. State of South Australia, Ltd.* (1926), 38 C.L.R. 408; Digest Supp.
- (23) *James v. The State of South Australia* (1927), 40 C.L.R. 1; Digest Supp.

- (24) *Ex p. Nelson* (No. 2) (1929), 42 C.L.R. 258; Digest Supp.
(25) *Victorian Stevedoring & General Contracting Pty., Ltd. v. Dignan* (1931), 46 C.L.R. 73; Digest Supp.
(26) *James v. The Commonwealth* (1935), 52 C.L.R. 570; Digest Supp.

APPEAL by special leave by the appellant (the plaintiff) from an order and judgment of the Full High Court of Australia (RICH, STARKE, DIXON, EVATT and McTIERNAN, JJ.), dated June 11, 1935, whereby it was, *inter alia*, ordered and adjudged that a demurrer by the respondents (the defendants) to the whole of the appellant's statement of claim should be allowed, and from an order and judgment of STARKE, J., dated June 28, 1935, whereby it was ordered that judgment be entered for the respondents.

The plaintiff in this action, Frederick Alexander James, seeks a declaration against the Commonwealth of Australia, that the Dried Fruits Act, 1928-1935, and regulations made thereunder, contravene sect. 92 of the constitution, and are therefore invalid. The Commonwealth issued a summons seeking an order that the action be dismissed or the statement of claim struck out, and it also demurred to the statement of claim. The summons was founded upon the provisions of Ord. XVII, r. 30, and also upon the inherent jurisdiction of the court under Ord. XLIV, r. 2, to stay the plaintiff's action. The summons was referred to the Full Court.

The action was brought by a fruit merchant, who desired to resist the operation of the legislation embodied in the Dried Fruits Act, 1928-1935, of the Commonwealth and in the regulations thereunder. The substance of his case is that the legislation is inconsistent with sect. 92 of the constitution and therefore void. In 1928 the same plaintiff brought an action against the Commonwealth, in which he complained first, that the Dried Fruits Act, 1928, and the regulations thereunder were inconsistent with sect. 92 of the constitution and therefore invalid, and, second, that the regulations were inconsistent with sect. 92 of the constitution and therefore invalid. The Commonwealth demurred to the plaintiff's statement of claim in that action. The demurrer was overruled upon the ground that the regulations were contrary to sect. 92 and altogether void. The court expressed the opinion, however, and in that sense decided, that sect. 92 did not bind the Commonwealth and that for this reason the first ground of the plaintiff's attack upon the legislation failed. After the demurrer, the action, so far as it affected the Commonwealth was disposed of by an agreement between the parties, part of which was given effect to by a consent order dismissing the Commonwealth from the action. The order did not affect the plaintiff's rights in this action. The proceedings upon the demurrer are reported in 41 C.L.R. 442. Although the court expressed the view that the Commonwealth legislature was unaffected by the provisions of sect. 92, it appears from the judgment of HIGGINS, J., at p. 458, that,

in the absence of a Full Board of judges, it was deemed undesirable to permit any reconsideration of the pronouncement in *McArthur's* case (1) that the Commonwealth was not bound by sect. 92. The present action was instituted with the view of carrying to the Privy Council the question whether sect. 92 binds the Commonwealth. The substantial question therefore is whether the Dried Fruits Act, 1928-1935, and the regulations thereunder, infringe upon sect. 92 of the constitution. The real question for decision is whether sect. 92, by declaring that inter-state trade shall be free, means that it shall be free of state governmental interference, or free of state and Commonwealth governmental interference.

Wilfrid Barton and *Kevin Ward* (of the Australian Bar) for the appellant.

The Attorney-General for Australia (*Robert Menzies, K.C.*), *Gavin T. Simonds, K.C.*, and *Hon. H. L. Parker* for the respondents, and the interveners the state of Victoria.

Sir Stafford Cripps, K.C., and *Paul Springman* for the interveners, the state of Tasmania and the state of Western Australia.

H. E. Manning, K.C., and *A. C. Nesbitt* for the interveners, the state of New South Wales, and the state of Queensland.

Wilfrid Barton : This appeal gives rise to two questions : (i) Whether sect. 92 of the constitution of the Commonwealth of Australia binds states and Commonwealth, or states alone ; (ii) Whether the Dried Fruits Act and regulations and orders made under them are *ultra vires* the Commonwealth. The first question was decided in *McArthur's* case (1), in which it was held that Commonwealth was not bound. In *McArthur's* case (1) the only question for decision was whether a law of the state of Queensland fixing maximum prices for sale of commodities interfered with the freedom of inter-state trade. No question arose in that action whether the Commonwealth was or was not bound by sect. 92, and the opinion expressed by the majority was wholly unnecessary to the decision. of the only point before the court and *obiter*. Indeed, in the present case, *RICH, J.*, observed :

In this court it has even been found possible to disregard the question whether the Commonwealth is bound in deciding over what area of subject matter the freedom from state interference guaranteed by sect. 92 operates.

Therefore, judgment should have been entered for the appellant by the High Court in consonance with the opinion of the majority. The opinions expressed in *McArthur's* case (1) are erroneous. The prohibition of sect. 92, is, as it is expressed to be, absolute and universal, guaranteeing to the individual, as a citizen of the Commonwealth, those fundamental rights of free intercourse and trade which follow from and indeed are inseparable from his citizenship ; the contrary view is based on a fallacy, proceeds from and can only be justified by reading into the constitution

words which are not there, and wholly neglects and indeed denies the root idea of the whole constitution, the establishment of a system "based on the absolute freedom of trade among the states" (*Colonial Sugar Refining Co., Ltd. v. Irving* (21) at p. 367) and the abolition of internal barriers to trade and intercourse, the evils of which were patent and pressing at the date of the inception of the Commonwealth. The ground given in *McArthur's* case (1), namely, that sect. 92, if binding upon the Commonwealth, would "practically" nullify the legislative powers expressly granted by sect. 51 (1), cannot be substantiated, because it overlooks the fact that the legislative powers given by sect. 51 (1) are expressed to be "subject to the constitution" and are therefore powers granted subject to sect. 92. Sect. 92 leaves a wide field for commonwealth or state legislation, as pointed out by ISAACS, J., in dismissing this very objection in *Duncan's* case (10); it leaves the Commonwealth the beneficial functions of fostering inter-state trade by bounties, by improvement of communications, or of marketing, by remission of excise or income tax, of protecting such trade against monopoly or dishonesty or of regulating it in all ways in which the home trade of a nation untroubled by internal borders may be regulated. The argument, too, omits to notice that, by parity of reasoning the state must also be exempted and sect. 92 reduced to nullity. The state before federation, possessed the fullest powers of legislation as to all trade, whether inter-state or not, by laws operating within its borders, and so far from taking away those powers, the constitution, by sect. 107, expressly confirms the state in them and re-grants them, as was recognised by ISAACS, J., in *Duncan's* case (10), at p. 622. If, therefore, the possession of legislative powers, not, be it noted, exclusive, by the Commonwealth, prevents the operation of sect. 92, so too must the possession of the same powers, even though limited as to territorial extent, exclude the operation of sect. 92 in the case of the state. The words of sect. 92 should be construed in their ordinary and natural meaning and, so construed, they enact that the state boundaries are to be forgotten for the purposes of inter-state trade and only by so construing them can the real objects of the federal constitution as a whole be achieved. Sect. 92 of the constitution is binding upon Commonwealth and State Parliaments alike. Upon a proper construction, the Dried Fruits Act and the regulations and determinations made thereunder conflict with sect. 92, as the High Court found, and are *ultra vires* and void, because such Act, regulations and determinations are *ultra vires* the Federal Parliament. The Dried Fruits Act, ss. 3, 5a, conflict with sect. 92 and are *ultra vires* and the Act without these sections is inoperative and of no effect. The regulations and especially reg. 6 (b) (ii) and the determinations of the Minister purporting to be made thereunder are *ultra vires* and void. The Dried Fruits Act and the regulations and determinations made thereunder limit and destroy the

right to absolute freedom of inter-state trade guaranteed by the constitution to the citizen.

The Attorney-General for Australia (Robert Menzies, K.C.): The decision in *McArthur's* case (1) is correct and the respondents are not in any way bound by sect. 92 of the constitution. It is true that the Act the validity of which was there under consideration was a state Act and that the respondents were not a party and did not intervene, but the question whether the respondents were so bound was fully argued since the point was the basis upon which the case was decided. Since that time a number of decisions have been given in which the High Court of Australia have followed *McArthur's* case (1) on this point, and it has now been the settled law of Australia for some sixteen years that sect. 92 does not bind the respondents and both the respondents and the states have enacted and put into effect important legislation on this assumption. The High Court has expressly or tacitly followed the decision in *McArthur's* case (1) on this point in *Commonwealth v. State of South Australia, Ltd.* (22); *James v. South Australia* (23) per GAVAN DUFFY, RICH and STARKE, JJ., at p. 41; per ISAACS, A.C.J., and POWERS, J., at p. 32; *James v. The Commonwealth* (20) per KNOX, C.J., and POWERS, J., at p. 455; per HIGGINS, J., at p. 458; per STARKE, J., at p. 463; *Ex p. Nelson (No. 1)* (17) per ISAACS, J., at pp. 224, 226, 230, 234, 242; *Ex p. Nelson (No. 2)* (24) per ISAACS, J., at p. 264; per RICH, J., at pp. 267, 268; per STARKE, J., at pp. 268-269; per DIXON, J., at pp. 271-273; *James v. Cowan* (5) per ISAACS, J., at p. 421; per RICH, J., at p. 424; *Huddart Parker, Ltd. v. Commonwealth* (19) (the decisions in this case and the next case mentioned necessarily involved the assumption that sect. 92 does not bind the Commonwealth; and see judgment of EVATT, J., at pp. 522, 524, 526); *Victorian Stevedoring & General Contracting Pty., Ltd. v. Dignan* (25); *R. v. Vizzard, Ex p. Hill* (12) per GAVAN DUFFY, C.J., at p. 47; per RICH, J., at p. 49; per STARKE, J., at p. 55; per DIXON, J., at p. 56; *James v. The Commonwealth* (26) the matter in which the present appeal is brought. The weight of authority on the point in question is emphasised in this case in the judgment of DIXON, J., at p. 593. The following among other Federal Acts have been enacted on the assumption that sect. 92 of the constitution is not binding upon it: Post and Telegraph Act, 1901-1923; Secret Commissions Act, 1905; Commerce (Trade Descriptions) Act, 1905-1933; Australian Industries Preservations Act, 1906-1930; Seamen's Compensation Act, 1911; Navigation Act, 1912-1935; Sea Carriage of Goods Act, 1924; Transport Workers Act, 1928-1929; Wireless Telegraphy Act, 1905-1919; Sales Tax Act, 1930-1935; Dairy Produce Act, 1933-1935. The provisions of the constitution were designed to place the foreign and inter-state trade and commerce of Australia in the control of the respondents as representing the whole nation and to

remove it from the states. So soon as the respondents assumed the legislative control of the customs on such a national basis, state interference with the freedom of inter-state trade, commerce, and intercourse was intended to cease and sect. 92 of the constitution merely provides freedom in such matters from state interference. That section forms one of a series of sections commencing with sect. 86, which provide for the imposition by the respondents of uniform duties of customs within two years of the establishment of the Commonwealth, with interim state rights and eventual state exclusion and leave the respondents' power to legislate under sect. 51 (1) of the constitution untouched. Sect. 51 (1) itself contains no express prohibition or limitation on the power of the respondents. Where it is intended to prohibit or limit its power to legislate, the constitution expressly so provides. Thus the powers set out in sect. 51 (ii), (iii), (x), (xiii), (xiv), (xx), (xxvi), (xxxi), (xxxii), (xxxiii), (xxxiv), (xxxv) and (xxxvii), are expressly limited, and sects. 99, 100 and 117 expressly prohibit certain legislation. All the declared powers of the respondents in sect. 51 and in particular that contained in sect. 51 (1) are permanent powers coming into being at the commencement of the constitution and continuing thereafter. If sect. 92 is binding on the respondents, however, it appears to follow that whereas for a period up to the imposition of uniform duties of customs the respondents' power under sect. 51 (1) was unlimited, save by sect. 92, yet after that period that power became to a large extent if not wholly nugatory and trade, commerce and intercourse among the states became uncontrollable by both state and federal legislation. It was pointed out by the majority of the judges in *McArthur's* case (1) that if sect. 92 binds the respondents the power to legislate for the peace, order, and good government of the Commonwealth with respect to trade and commerce among the states, which is specially given to the respondent by sect. 51 (1), would be rendered ineffective and practically nugatory. All legislation for the good government of inter-state trade must almost certainly involve some interference with the absolute freedom which the appellant contends is afforded by sect. 92. The Dried Fruits Act is just the type of legislation which it was intended that the respondents should have power to enact under sect. 51 (1). The production of dried fruits is an industry of chief importance in the states of South Australia, Victoria, and to a less extent Western Australia. The production in those states is very much greater than the total consumption of all the states of the Commonwealth, and the surplus must therefore be exported. The said Act and the said regulations were designed to and do promote the best interests of the industry as a whole, by giving a protected market, and such legislation is essential for the order and good government of trade and commerce with other countries and among the states and in the Commonwealth as a whole. Apart from the validity or non-validity of

this Act the legislation under the constitution would be seriously affected if sect. 92 is binding upon it and is given the meaning contended for by the appellant. Thus it is not only the power under sect. 51 (1) which is affected. The words "trade, commerce and intercourse among the states . . . shall be absolutely free" if given a very wide interpretation would require that many of the enumerated powers of the respondents under the constitution should be subject to considerable limitation if their exercise is not to infringe sect. 92. This would have the effect of making the constitution a maimed instrument of self-government. If binding upon it, the section is equally binding in times of emergency, such as in the case of war or the outbreak of disease. The question turns to a large extent on the meaning of the words "absolutely free." The wider the meaning given to these words the more are the powers under sect. 51 (1) rendered nugatory. There is no logical reason for and many practical difficulties in drawing any line between interpreting the words as free of all interference in its character as trade and commerce and as free from pecuniary imposts only. If sect. 92 binds the respondents, it is difficult to conceive the necessity for the insertion, in the same part of the constitution, of other sections in which the powers of the respondents are expressly limited. If on the other hand sect. 92 does not bind the respondents, these other sections become essential provisions, and subject thereto, sect. 51 (1) will still have its full effect. The constitution must be looked at as a whole and that construction should be adopted which gives a reasonable meaning to all parts thereof rather than one which has the effect of making certain parts almost if not wholly nugatory, and leaving certain matters, which were, prior to federation, fully controllable by the parliament of each colony, uncontrollable by federal, as well as by state legislation. Further, in construing a constitution of a growing country, some breadth of interpretation is permissible. One would expect that the totality of powers of the federal and state legislatures would be capable of covering the whole field of legislation. In the case therefore of an ambiguity, that interpretation should be adopted which will enable the combined legislative powers to cover the whole field of self-government. The powers of the Commonwealth and of the states are concurrent and not mutually exclusive, as in the constitution of Canada. If, contrary to the respondents' primary contention, it be held that sect. 92 is binding upon them then that section is confined to a prohibition of the imposition of border or inter-state duties or customs upon goods passing from one state to another. There is no interference with the freedom protected by sect. 92, where the legislation in question regulates or controls inter-state trade merely as part of a general scheme for the order and good government of trade in general, whether inter-state, intra-state, or foreign and does not impose restrictions on inter-state trade in virtue of its inter-state character. In order to render legis-

lation invalid, such legislation must amount to a direct or immediate as opposed to an indirect or consequential restraint, either on inter-state trade as such, or if part of a general scheme, by imposing rules in relation to inter-state trade which are not imposed on intra-state or foreign trade. In any event sect. 92 on its true construction does not render invalid the said Act or the regulations made thereunder. Sect. 92 is not binding on the respondents. The opinion expressed by the majority of the judges in *McArthur (W. & A.), Ltd. v. Queensland* (1) is correct. The whole government and regulations of trade in Australia has proceeded on the assumption that sect. 92 is not binding on the respondents, and the result of holding that it is binding on the respondents at all or in the manner contended for by the appellant would be to render invalid a large number of laws necessary for the good government of the Commonwealth with respect to trade and commerce with other countries and among the states and in the Commonwealth as a whole, and to make the exaction of penalties thereunder illegal. The Dried Fruits Act, 1928-1935, and the regulations made thereunder are valid laws of the respondents and the acts alleged to have been done by the respondents were authorised thereunder.

Sir Stafford Cripps, K.C. : Whilst sects. 51 (1), 90, 91, 98 to 104, 112, and 113 of the constitution deal specifically with state laws or federal powers, sect. 92, occurring in this context is not in terms confined to either, but it is expressed in the wisest terms applicable to both states and Commonwealth. The object of these provisions, read together, is to secure, not merely uniformity in legislation relating to trade and commerce across state boundaries, but the total elimination of such boundaries as barriers in the way of the free interchange of goods between the inhabitants of the several states. The provisions of sect. 92 were fundamental to the constitution pact entered into by the inhabitants of the various Australian states when the federation was formed, and it was because of the absolute freedom of inter-state trade so guaranteed that the inhabitants of those states, which were given only small representation in the federal legislature, were prepared to subject themselves to virtual control by the inhabitants of the larger and more populous states in the matters transferred to the power of the Federal Parliament by the Constitution Act. The words "absolutely free" in sect. 92 do not nullify the powers conferred by sect. 51 (1). The nature of the legislation must be looked at in order to ascertain whether in its scope and object the subject matter of the legislation fell within the category of "trade and commerce," or whether it was legislation primarily upon a different category, e.g., health, quarantine, etc., which only incidentally affected trade and commerce. "Freedom" does not mean freedom from regulation on other subject matters, such as health, etc., any more than "freedom of speech" covers freedom to make fraudulent, defam-

atory or seditious statements, and you must therefore look at the scope and purpose of this legislation in order to find whether it imposes restrictions on trade and commerce as such, or whether the restrictions are truly and substantially referable to some other subject matter. Prior to the date of *McArthur's* case (1) the question of the interpretation of sect. 92 had frequently been referred to in the High Court of Australia, and it had been stated on numerous occasions that sect. 92 bound the Commonwealth and states alike. See *Fox v. Robbins* (6), per ISAACS, J., at pp. 127-128; *R. v. Smithers, Ex p. Benson* (7), per ISAACS, J., at p. 117; *New South Wales v. Commonwealth, etc.* (8), per GRIFFITH, C.J., at p. 66, BARTON, J., at p. 79, ISAACS, J., at pp. 95, 100, 101, GAVAN DUFFY, J., at pp. 104-105, adopted by RICH, J., at p. 111; *Foggitt, Jones & Co., v. New South Wales* (9), per ISAACS, J., at p. 365; *Duncan v. Queensland* (10), per GRIFFITH, C.J., at pp. 572, 573, BARTON, J., at pp. 588, 593, 594, ISAACS, J., at pp. 616, 620, 624. Prior to the case of *Duncan v. Queensland* (10), not a single judge had expressed a doubt as to the application of sect. 92 to the Commonwealth, and in that case it was equally stated that sect. 92 applied to the Commonwealth. For the first time in the judgments in *McArthur's* case (1), the majority of the court stated that sect. 92 was intended to apply only to state and not to Commonwealth legislation. This implied restriction upon the clear words of the section was introduced because those judges were of the opinion that if sect. 92 were held to apply to the Commonwealth, it would then conflict with the provisions of sect. 51 (1). There is no room for implication, in view of the clear words of sect. 92. There is no difficulty in giving full effect to the federal trade and commerce power in sect. 51 (1) without modifying the clear words of sect. 92. Sect. 92 exists for the protection of individual rights against Commonwealth and state legislation alike and expresses in the terms of a fundamental and organic law one of the principal objects of the inhabitants of Australia in entering into the federation. According to its true interpretation, sect. 92 is not confined to state legislation, but covers equally Commonwealth as well as state legislation. There is no ambiguity in sect. 92 to justify any implication cutting down the generality of the words therein used. Sect. 51 (1) of the constitution ought to be read subject to sect. 92, and when so read still leaves ample scope for the exercise of the federal trade and commerce power. Proper effect can be given to the words of both sect. 92 and sect. 51 (1) without contradiction and without straining the natural and ordinary meaning of either. Any prohibition or restriction as to the extent or quantity of inter-state trade in normal and legitimate articles of commerce by a state legislature or by the Federal Parliament is a violation of sect. 92 of the constitution. The Dried Fruits Act, 1928-1935, and the regulations thereunder, impose such prohibitions and restrictions upon inter-state trade and are therefore invalid.

The Judgment of their Lordships was delivered by LORD WRIGHT, M.R.

LORD WRIGHT, M.R. : The appellant, Frederick Alexander James, is a grower and processor of dried fruits in the State of South Australia. His products have been for many years largely sold in various states, including New South Wales, Victoria, Western Australia and South Australia. In the action he claimed damages for the seizure by or on behalf of the respondents (Commonwealth) of (i) 50 cases of dried fruits which he had shipped on a steamship in Apr., 1932, at Port Adelaide, consigned to E. D. Clarton for delivery at Sydney, New South Wales, in part performance of a contract of sale, and (ii) of 20 cases of dried fruits in June, 1932, which he had shipped at Port Adelaide consigned to H. Hooper & Co. for delivery at Sydney, New South Wales, in part performance of a contract. He further claimed a declaration that the Dried Fruits Act, 1928-1935, of the Parliament of the Commonwealth contravenes sect. 92 of the constitution embodied in the Commonwealth of Australia Constitution Act, 1900 (hereinafter called the constitution) is invalid, and that the regulations made under the Dried Fruits Act, 1928-1935, or some part thereof are likewise invalid. He complained that under and in virtue of the Act and regulations and a determination made thereunder, he had been prevented from sending his dried fruits out of South Australia in fulfilment of various inter-state contracts which he had made. The Commonwealth took out a summons to dismiss the claim as an abuse of the process of the court in that the substantial questions had already been litigated between the parties and decided against the appellant in an action (No. 54 of 1928) entitled *James v. Commonwealth*. The Commonwealth also demurred to the whole of the statement of claim on the grounds in law that the Dried Fruits Act, 1928-1935, and the Dried Fruits (Inter-State Trade) Regulations are valid laws of the Commonwealth and that the acts complained of were authorised by the Act or regulations. The summons and demurrer were heard together by the High Court of Australia. The summons was dismissed and the Commonwealth does not appeal against that dismissal. The demurrer was, however, allowed and the action dismissed ; it is from this that the present appeal is by special leave brought. The States of New South Wales, Queensland and Victoria have intervened in support of the contentions of the Commonwealth, while the States of Tasmania and Western Australia have intervened in support of the contentions of the appellant.

The substantial question in this appeal, which is of great constitutional and commercial importance, is whether sect. 92 of the constitution binds the Commonwealth, and if so whether the Dried Fruits Act and regulations contravene it.

Sect. 92 is in the following terms :

On the imposition of uniform duties of customs, trade, commerce, and intercourse

among the states, whether by means of internal carriage or ocean navigation, shall be absolutely free.

But notwithstanding anything in this constitution, goods imported before the imposition of uniform duties of customs into any state, or into any colony, which, whilst the goods remain therein, becomes a state, shall, on thence passing into another state within two years after the imposition of such duties, be liable to any duty chargeable on the importation of such goods into the Commonwealth, less any duty paid in respect of the goods on their importation.

The Dried Fruits Act, 1928-1935, enacted by sect. 3 :

(1) Except as provided by the regulations—

(a) the owner or person having possession or custody of dried fruits shall not deliver any dried fruits to any person for carriage into or through another state to a place in Australia beyond the state in which the delivery is made : and

(b) the owner or any other person shall not carry any dried fruits from a place in one state into or through another state to a place in Australia beyond the state in which the carriage begins, unless he is the holder of a licence then in force, issued under this Act, authorising him so to deliver or carry such dried fruits, as the case may be, and the delivery or carriage is in accordance with the terms and conditions of that licence.

Penalty : One hundred pounds or imprisonment for six months.

(2) Prescribed authorities may issue licences, for such periods and upon such terms and conditions as are prescribed, permitting the delivery of dried fruits to any person for carriage or the carriage of dried fruits from a place in one state to a place in Australia beyond that state.

(3) Any dried fruits which have been, or are in process of being, carried in contravention of this Act, shall be forfeited to the King.

There was also power to the prescribed authority to forfeit and cancel a licence and the Governor-General was authorised to make, and has made, regulations for giving effect to the Act. The relevant regulations, Dried Fruit (Inter-State Trade) Regulations, in force at the material times provided that an owner's licence to export should be issued on the terms (*inter alia*) :

(ii) That the licensee shall export from Australia, or cause to be exported on his behalf, during the period for which his licence has been issued and during such further period as a prescribed authority considers necessary, such percentage of the dried fruits produced in Australia during any specified periods which came into the possession or custody of the licensee prior to the date of issue of his licence, or which come into the possession or custody of the licensee on and after the date of issue of this licence, as is from time to time fixed by the Minister, upon the report of a prescribed authority, and notified in the *Gazette*.

In accordance with the Act and regulations the Commonwealth Minister of State for Commerce on Feb. 20, 1935, determined that it should be a condition of the granting of a licence that the licensee should cause to be exported from Australia certain specified proportions of the Australian dried fruits possessed by him, varying from 60 to 90 per cent. according to the description of the fruit. The appellant, contending that the Act and regulations and the determination were invalid, refused to

apply for a licence or undertake the prescribed conditions. In consequence his consignments were seized and forfeited, and the railway authorities and shipping companies to whom he tendered his dried fruits for carriage from the State of South Australia to other states refused to take them, in virtue of the prohibitions and penalties imposed under the Act by reason of the circumstance that the appellant had no licence.

The High Court in allowing the demurrer, did so because they could not hold that the Commonwealth was bound by sect. 92 without departing from an opinion of the High Court given in 1920 in *McArthur v. Queensland* (1), that the Commonwealth was not bound by the section. At the same time DIXON, EVATT and McTIERNAN, JJ., expressed their individual views to the contrary effect. RICH and STARKE, JJ., devoted their opinions rather to pointing out the difficulties that would attend a reconsideration of *McArthur's* case (1) than to an approval of the interpretation of sect. 92 which it embodied. STARKE, J., said :

The case has been acted upon so long that this court should now treat the law as settled. Its review should be undertaken, if at all, by the Judicial Committee.

It may, however, be noted that this particular question of the interpretation of sect. 92 did not directly arise in *McArthur's* case (1) ; the Commonwealth was not a party, and did not intervene in that case, in the words of RICH, J. : " Until the present case the question has not been presented to the court for definitive judicial decision." But as STARKE, J., points out, the question cannot be decided without a careful consideration of the true effect of sect. 92 and of the numerous cases relating to state powers decided under that section. This is necessary because a principal, or, more precisely, the principal argument for the thesis maintained on behalf of the Commonwealth in this case is that sect. 92, if applied to the Commonwealth would practically nullify the express powers granted to the Commonwealth in sect. 51 (i). It must at the outset be admitted that though the judgments in the High Court on sect. 92 present a great, and perhaps embarrassing, wealth of experience, learning and ratiocination the decisions and the various reasons which they embody are not always easy to reconcile and present considerable differences of judicial opinion. This can cause no surprise when the extreme difficulty and high importance of the questions are remembered. Before the matter is examined in detail, some general observations may be made.

The constitution of the Commonwealth was, in the words of VISCOUNT HALDANE, L.C., delivering the judgment of this Board in *A.-G. for Commonwealth of Australia v. Colonial Sugar Refining Co., Ltd.* (2), at p. 252, " federal in the strict sense of the term." He goes on to say, at p. 253, that :

In a loose sense the word " federal " may be used, as it is there [i.e., in the British

North America Act of 1867] used, to describe any arrangement under which self-contained states agree to delegate their powers to a common government with a view to entirely new constitutions even of the states themselves. But the natural and literal interpretation of the word confines its application to cases in which these states, while agreeing on a measure of delegation, yet in the main continue to preserve their original constitutions.

On the following page he adds :

In fashioning the constitution of the Commonwealth of Australia the principle established by the United States was adopted in preference to that chosen by Canada. It is a matter of historical knowledge that in Australia the work of fashioning the future constitution was one which occupied years of preparation through the medium of conventions and conferences in which the most distinguished statesmen of Australia took part. Alternative systems were discussed and weighed against each other with minute care. The Act of 1900 must accordingly be regarded as an instrument which was fashioned with great deliberation, and if there is at points obscurity in its language, this may be taken to be due not to any uncertainty as to the adoption of the stricter form of federal principle, but to that difficulty in obtaining ready agreement about phrases which attends the drafting of legislative measures by large assemblages.

The broad principle of this federal system is to be found as regards the states in particular, in sect. 107, which provides :

Every power of the Parliament of a colony which has become or becomes a state, shall unless it is by this constitution exclusively vested in the Parliament of the Commonwealth or withdrawn from the Parliament of the state, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the state, as the case may be.

As regards the Commonwealth, sect. 51 contains a list of 39 enumerated powers with which it is vested. Sect. 52 defines the cases in which the power of the Commonwealth is to be exclusive. Sect. 51 begins as follow :

The Parliament shall, subject to this constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to

Then comes head (i) which is essentially material in this case. "Trade and commerce with other countries and among the states." Other heads are "taxation, but so as not to discriminate between states or parts of states," bounties, postal, telegraphic, telephone and other like services, quarantine, currency, banking and insurance subject to limitations, bills of exchange, influx of criminals and a number of other powers. Thus the powers of the states were left unaffected by the constitution except in so far as the contrary was expressly provided ; subject to that each state remained sovereign within its own sphere. The powers of the state within those limits are as plenary as are the powers of the Commonwealth. Thus the state has the same power as the Commonwealth to legislate for the peace, order and good government of the state with respect to inter-

state trade, commerce and intercourse subject to the limitations of its territorial sovereignty and so far as sect. 109, which provides that in the event of inconsistency between the law of the Commonwealth and of a state, the former shall prevail, does not apply. There are, however, certain sections of the constitution which call for special mention as throwing light on sects. 51 and 92. Thus reference may be made to the sections dealing with customs and excise duties, in particular sects. 86 to 95, in the midst of which sect. 92 is placed. It is well known that one of the objects which the federation sought to achieve was the abolition of restrictions on trade between the colonies and of the diversity in the different states of tariffs and border regulations; this was described as "the old inter-colonial trade war" (in *McArthur's* case (1) at p. 545). Thus sect. 86 provides that on the establishment of the Commonwealth the collection and control of duties of customs and excise shall pass to the Commonwealth, sect. 87 deals with the disposal of the revenue as between Commonwealth and states, sect. 88 provides that uniform duties of customs shall be imposed within two years after the establishment of the Commonwealth, sect. 90 provides that :

On the imposition of uniform duties of customs the power of the Parliament to impose duties of customs and of excise, and to grant bounties on the production or export of goods, shall become exclusive.

On the imposition of uniform duties of customs all laws of the several states imposing duties of customs or of excise, or offering bounties on the production or export of goods, shall cease to have effect, but any grant of or agreement for any such bounty lawfully made by or under the authority of the government of any state shall be taken to be good if made before June 30, 1898, and not otherwise.

Then sect. 92 after the interposition of sect. 91 which deals with bounties, follows. By sect. 95, Western Australia was given a temporary and exceptional power to impose duties of customs on goods passing into that state and not originally imported from beyond the limits of the Commonwealth, but such duties were to be collected by the Commonwealth. In addition to these sections may be noted sect. 112, which gives a state power to levy on imports and exports or on goods passing into or out of a state such charges as may be necessary for executing the inspection laws of the state, but these inspection laws are subject to be annulled by the Parliament of the Commonwealth, and the net produce of the charges is to be for the use of the Commonwealth. Certain other sections must be read with sect. 51 (i) : thus sect. 98 specifies that trade and commerce is to include navigation and state railways, sect. 99 provides against any preference by the Commonwealth to any state in respect of trade, commerce or revenue, sect. 100 forbids the Commonwealth by any law or regulation of trade or commerce, to abridge the use of waters of rivers, and sects. 101 to 104 deal with the constitution of an inter-state commission for the execution and maintenance of the provisions of the

constitution and of laws made thereunder relating to trade and commerce.

The question, then, is one of construction, and in the ultimate resort must be determined upon the actual words used, read not *in vacuo* but as occurring in a single complex instrument, in which one part may throw light on another. The constitution has been described as the federal compact and the construction must hold a balance between all its parts. Though the question here is not as to the division of powers between Commonwealth and states, but as to the existence in the Commonwealth of the power which is impugned, yet it is appropriate to apply the words of LORD SELBORNE in *R. v. Burah* (3), at pp. 904 and 905 :

The established courts of justice, when a question arises [in regard to a constitution] whether the prescribed limits have been exceeded, must of necessity determine that question ; and the only way in which they can properly do so, is by looking to the terms of the instrument by which, affirmatively, the legislative powers were created, and by which, negatively, they are restricted. If what has been done is legislation, within the general scope of the affirmative words which give the power, and if it violates no express condition or restriction by which that power is limited (in which category would, of course, be included any Act of the Imperial Parliament at variance with it), it is not for any court of justice to inquire further, or to enlarge constructively those conditions and restrictions.

It is true that a constitution must not be construed in any narrow and pedantic sense. The words used are necessarily general and their full import and true meaning can often only be appreciated when considered, as the years go on, in relation to the vicissitudes of fact which from time to time emerge. It is not that the meaning of the words changes, but the changing circumstances illustrate and illuminate the full import of that meaning. It has been said that :

in interpreting a constituent or organic statute such as the Act [i.e., the British North America Act], that construction most beneficial to the widest possible amplitude of its powers must be adopted.

(*British Coal Corporation v. R.* (4), at p. 518.) But that principle may not be helpful, where the section is, as sect. 92 may seem to be, a constitutional guarantee of rights, analogous to the guarantee of religious freedom in sect. 116, or of equal right of all residents in all states in sect. 117. The true test must, as always, be the actual language used. Nor can any decisive help here be derived from evidence of extraneous facts existing at the date of the Act of 1900 ; such evidence may in some cases help to throw light on the intention of the framers of the statute, though that intention can in truth be ascertained only from the language used. But new and unanticipated conditions of fact arise. It may be that in 1900 the framers of the constitution were thinking of border tariffs and restrictions in the ordinary sense and desired to exclude difficulties of that nature,

and to establish what was and still is called "free trade," and to abolish the barrier of the state boundaries so as to make Australia one single country. Thus they presumably did not anticipate those commercial and industrial difficulties which have in recent years led to marketing schemes and price control, or traffic regulations such as those for the co-ordination of rail and road services, to say nothing of new inventions such as aviation or wireless. The problems, however, of the constitution can only be solved as they emerge by giving effect to the language used.

Before their Lordships proceed to the task of construction they may observe that they cannot shelter under the decision in *McArthur's* case (1), as the High Court felt they ought to do. The construction of sect. 92 has recently been dealt with by this Board in *James v. Cowan* (5), at p. 560, where it was said :

At one time in the argument it was suggested that to determine the point it would be necessary to come to a conclusion on a matter which has been decided differently at different times by the High Court—namely, whether sect. 92 applies to the Commonwealth as well as to the individual states. If to both, it was almost conceded that no question of limits *inter se* would arise. If to the states alone, then the violation of sect. 92 would, it is said, amount to an invasion of Commonwealth powers which would involve a question under sect. 74. Their Lordships, however, do not find it necessary to decide the question as to the application of sect. 92, which will remain for them an open question. If the implied prohibition in sect. 92 applies to both Commonwealth and states it would seem reasonably clear that there are no competing powers; the prohibited area is denied to both. But similarly, if the prohibition is addressed to the states alone, no question arises as to limits of powers between state and Commonwealth.

Hence the actual decision in that case does not throw light directly on the question before their Lordships in this appeal. This Board were there dealing with the effect of sect. 92 in the special circumstances of that case; no doubt they were considering the section only as applying to the states, but the decision must be considered now, along with the various decisions in the High Court in order to examine the argument that there is such an antinomy between sects. 51 and 92 that they cannot both apply to the Commonwealth. The argument advanced on behalf of the respondents, may be baldly thus expressed: trade and commerce mean the same thing in sects. 51 (i) and 92; the former section gives the Commonwealth power to make laws with respect to inter-state trade and commerce; sect. 92 enacts that inter-state trade and commerce are to be absolutely free; "absolutely free" means absolutely free from all governmental interference and control, whether legislative or executive; hence, it is said, there arises a direct and complete antinomy. The solution propounded has an attractive aspect of simplicity, but is it not merely illusory? Will it bear examination? Furthermore, the solution is not that sect. 92 simply cancels sect. 51 (i), but that sect. 51 (i) overrides sect. 92 so that the Commonwealth is

unaffected by sect. 92, though sect. 51 (i) is prefaced by the words "subject to the constitution," of which sect. 92 is a part, and though the provision for absolute freedom of inter-state trade would obviously come to nothing if the Commonwealth were unaffected by sect. 92. The section on its face is not qualified or limited.

Before turning to the statute with the object of construing its language in order to settle the problem, it seems to be convenient to refer briefly to some of the decisions of the High Court and to the decision of the Judicial Committee in order to see if they support the theory that there is the complete antinomy or overlapping between the two sections which has been propounded. It will be remembered that these decisions deal with sect. 92 as applied to the states, but they are helpful in seeking to ascertain what exactly sect. 92 means. In the decisions of the High Court on sect. 92 a line is generally drawn at *McArthur's* case (1) in 1920. Before that case, the judges of the High Court (including GRIFFITH, C.J., and ISAACS, BARTON and GAVAN DUFFY, JJ.) referred to the question and stated expressly that it applied equally to Commonwealth and states; it was also incidentally observed that sect. 92 left scope for the Commonwealth to act under sect. 51 (i).

The first case to be noted is *Fox v. Robbins* (6), where it was held that a state law requiring a higher licence fee to be paid for selling wine manufactured from fruit grown in another state was invalid under sect. 92. GRIFFITH, C.J., said, at p. 119:

This provision would be quite illusory if a state could impose disabilities upon the sale of products of other states what are not imposed upon the sale of home products.

The extra fiscal burden imposed on the imported products was clearly inconsistent with the absolute freedom of the border. In *R. v. Smithers* (7) it was held that "intercourse" in sect. 92 was not limited to commercial intercourse and that the right of the people of Australia to cross a state line was not so restricted; ISAACS, J., said at p. 117:

In my opinion, the guarantee of inter-state freedom of transit and access for persons and property under sect. 92 is absolute—that is, it is an absolute prohibition on the Commonwealth and states alike to regard state borders as in themselves possible barriers to intercourse between Australians.

An Act prohibiting the entry into the state of ex-criminals from another state was held by ISAACS and HIGGINS, JJ., to be invalid. The three other cases before 1920 were not quite so simple. They dealt with war-time state Acts for expropriating foodstuffs or for keeping them within the state. The first, generally described as the *Wheat* case (8), held that the Wheat Acquisition Act, 1914, of New South Wales, was not a contravention of sect. 92; wheat had been expropriated under

that Act, subject to compensation; contracts were to be cancelled so far as not completed by delivery. ISAACS, J., thus summed up his opinion at p. 101 :

I am clearly of opinion that sect. 92 has no such function, and that while neither states nor Commonwealth can detract from the absolute freedom of trade and commerce between Australian citizens in the property they possess, there is nothing to prevent either states or Commonwealth, for their own lawful purposes, from becoming themselves owners of that property and applying it, according to law, to the common welfare.

GAVAN DUFFY, J., said at p. 104 :

It is to be observed that sect. 51 (i) of the constitution enables Parliament to make laws for the peace, order and good government of the Commonwealth with respect to "Trade and commerce with other countries, and among the states." The words "absolutely free" in sect. 92 must therefore be subject to some limitation so as to give them a meaning which is consistent with the existence of this legislative power, and the meaning when ascertained must be the same always and in all conceivable circumstances; it must apply equally when we are considering the right of the Commonwealth to legislate under sect. 51 (i), and of the states to legislate under sect. 107.

But this case which has never been expressly overruled, was distinguished in *Foggitt Jones & Co. v. State of New South Wales* (9), where it was held that an Act declaring that all stock and meat in the state should be kept at the disposal of the Government in aid of army supplies was in breach of sect. 92 because it prevented the transport of the stock across the border though the property in the stock was left in the owners. Soon afterwards, in *Duncan v. Queensland* (10), a different conclusion was arrived at by the majority of the court on an Act not apparently distinguishable in its terms from the New South Wales Act; it was there said that the Act operated as "a dedication of the stock and meat to public purposes." To the objection that the stock was removed from employment in inter-state trade, so that it could not be moved into another state, the answer was given that the real object of the Act was to conserve the stock and meat for the use of the imperial forces. The correctness of this last case may be questioned, and was indeed expressly dissented from in *McArthur's* case (1) by the majority of the court, but what is clear is that in this and the preceding cases the High Court was concerned with the question of freedom in passing the state borders. It might well be said that that freedom was not affected by a requisition, but was affected by a measure which prevented the taking of goods across the border into another state. Then came *McArthur's* case (1), which introduced a new conception. The question there was not limited to the question of freedom from restriction or burden or impost because of or in respect of actual or prospective passing from state to state. The freedom claimed and admitted was freedom from all

governmental control extending over the whole of any transaction which is treated as having the characteristic of inter-state commerce. This is something which goes beyond the mere act of transportation over the territorial frontier.

All the commercial dealings and all the accessory methods in fact adopted by Australians to initiate, combine and effectuate the movement of persons and things from state to state are all parts of the concept, because they are essential for accomplishing the acknowledged end.

"Absolutely free" means, so the majority of the court held, free from all governmental control by every governmental authority to whom the command contained in the section is addressed, that is, as trade and commerce and intercourse. But liberty it is conceded is not equivalent to anarchy or license. The analogy of free speech was adduced, as an instance in which freedom was reconciled with law. But this wide conception of the freedom given under sect. 92, if applied to the Commonwealth, would, so the judgment proceeded, practically nullify sect. 51 (i) and render impossible various Commonwealth Acts, so far as they relate to inter-state transactions, such as the Australian Industries Preservation Act, and others; hence the conclusion was reached that sect. 92 cannot apply to the Commonwealth. The Act in question in that case was the Queensland Profiteering Prevention Act, 1920, which made it unlawful for any trader in the state whether as principal or agent to sell goods at prices higher than the prices declared; the issue was whether agents for the plaintiffs, a Sydney firm, were committing a breach by selling in the state, at prices higher than the prescribed prices, goods of the plaintiffs to be despatched from Sydney and delivered to the purchasers in the state. It was held that the Act was invalid as contravening sect. 92: in other words, the protection of sect. 92 was taken to extend over the whole of the transaction until the sale was completed by delivery. There was no prevention or hindrance under the Act in respect of the passage of goods from state to state; the law applied equally to all goods sold in the state whether or not they came across the border; there was no discrimination against the plaintiffs' goods; rather there was discrimination in favour of them: they were held to fall into a class of privileged goods. It was said the prices might be so fixed as to place the sellers from the adjoining states at a disadvantage and have the same effect as a customs duty or bounty. But nothing of the sort was suggested to be in fact the case; on the contrary it seems these sellers had a preference. In truth the decision deprived Queensland of its sovereign right to regulate its internal prices. Thus the theory that sect. 92 did not bind the Commonwealth came into existence 20 years after the Commonwealth Act and as a corollary to a new construction of sect. 92.

Reference may now be made to later cases in which this idea appears to have been departed from. In *Roughley v. New South Wales* (11), the

validity of the Farm Produce Agents Act, 1926 (N.S.W.) was attacked. That Act made it an offence for any person in the state to act as a farm produce agent unless licensed by the state ; it required a farm produce agent to produce accounts and obey various other regulations. The question was whether that Act could legally be applied to agents selling for principals in other states who sent their goods to Sydney for sale ; it was claimed that the Act was invalid because it infringed sect. 92 as interfering with the freedom enacted by that section. That claim was rejected by the majority of the court (STARKE, J., dissenting), on the ground that the agents' operations were purely intra-state or domestic, and constituted a separate business, distinct from that of their principals. But ISAACS, J., consistently with *McArthur's* case (1), said at p. 185 :

All agency is forbidden in the nature of farm produce agency, except as prescribed. Therefore agency as a part and in many cases an essential part of inter-state trade is included. That is patently an infringement of sect. 92.

In this connection it is convenient to pass at once, returning later to certain intervening cases, to an important series of cases, of which *R. v. Vizzard* (12), affords the best example. The question in that case was whether the State Transport (Co-ordination) Act, 1931 (N.S.W.) contravened sect. 92. That Act provided that no public motor vehicle should be operated in the state unless it was licensed ; a Board was established with wide powers to grant or refuse licences and also to impose conditions ; a licence fee was to be paid. For various reasons, in particular the heavy state expenditure on railways and roads, the problem of co-ordinating railway and road services had become of great national importance. The appellant's motor lorry was a commercial vehicle used for the conveyance of goods from Melbourne to a place in New South Wales. It was not licensed, with the result that the driver was convicted under the Act. He appealed on the ground that the Act was invalid because it contravened sect. 92. GAVAN DUFFY, C.J., RICH, EVATT and McTIERNAN, JJ., held it did not. STARKE and DIXON, JJ., dissented. The validity of the two propositions laid down in *McArthur's* case (1) was there for the first time formally challenged. The Commonwealth had intervened and on their behalf that distinguished constitutional lawyer Sir Robert Garran, K.C., submitted that within the limits to which sect. 92 should be confined, it bound the Commonwealth and that the ruling in *McArthur's* case (1) was wrong. GAVAN DUFFY, C.J., EVATT and McTIERNAN, JJ., agreed with this argument in principle, though GAVAN DUFFY, C.J., thought it unnecessary that there should be an express decision by his casting vote. The elaborate judgment of EVATT, J., in that case is of great importance. It is impossible to quote here at length from it ; one short passage at p. 94 may be extracted :

Sect. 92 does not guarantee that, in each and every part of a transaction which

includes the inter-state carriage of commodities, the owner of the commodities, together with his servant and agent and each and every independent contractor co-operating in the delivery and marketing of the commodities, and each of his servants and agents, possesses, until delivery and marketing are completed, a right to ignore state transport or marketing regulations, and to choose how, when and where each of them will transport and market the commodities.

EVATT, J., points out that *Roughley's* case (11) is in truth inconsistent with what was laid down in *McArthur's* case (1). If this reasoning, which in *Vizzard's* case (12) was primarily applied to the states, as it seems to be, correct, then in principle it applies *mutatis mutandis* to the Commonwealth's powers under sect. 51 (i) and shows that sect. 51 (i) has a wider range than that covered by sect. 92. *Vizzard's* case (12) was followed in *O. Gilpin, Ltd. v. Commissioner for Road Transport (N.S.W.)* (13). A similar case had been *Willard v. Rawson* (14). *James v. Cowan* (5) had by that time been decided by this Board. That authority dealt with dried fruits legislation enacted by the state of South Australia. His Majesty in Council reversed the decision of the High Court, preferring the dissenting judgment of ISAACS, J., and held that the state Act which gave to the state powers of compulsory acquisition and the orders and seizures made under it, were invalid as contravening sect. 92. The Board held that the Act in question, partly by reason of its actual provisions, partly by reason of its admitted object, was tantamount to a prohibition of export. LORD ATKIN said at p. 558, in reference to the powers of expropriation :

If the real object of arming the Minister with the power of acquisition is to enable him to place restrictions on inter-state commerce, as opposed to a real object of taking preventive measures against famine or disease and the like, the legislation is as invalid as if the legislature itself had imposed the commercial restrictions.

He added :

It may be conceded that, even with powers granted in this form, if the Minister exercised them for a primary object which was not directed to trade or commerce, but to such matters as defence against the enemy, prevention of famine, disease and the like, he would not be open to attack because incidentally inter-State trade was affected.

The importance of this decision for the present purpose is that the test there adopted was whether the object of the Act was to prevent "the sale of the balance of the output in Australia"; the Act was directed "against selling to any of the states" in LORD ATKIN's words; so regarded the case is simply that of a restriction or prohibition of export from state to state, which necessarily involves an interference with the absolute freedom of trade among the states. The Board found it unnecessary to undertake the difficult task of defining the precise boundaries of the absolute freedom granted to inter-state commerce by sect. 92. *James v. Cowan* (5) was followed and applied by the High Court (EVATT, J.,

dissenting) in *Peanut Board v. Rockhampton Harbour Board* (15), in which the *Wheat* case (8) was distinguished. The producers of the peanuts, it was held, were prevented by the Act from engaging in inter-state and other trade in the commodity. The Act embodied, so the majority of the court held, a compulsory marketing scheme, entirely restrictive of any freedom of action on the part of the producers; it involved a compulsory regulation and control of all trade, domestic, inter-state and foreign; on the basis of that view, the principles laid down by this Board were applied by the court. There are only a few other cases to which their Lordships desire to refer. *Vacuum Oil Company Pty. Ltd. v. Queensland* (16), was a case in which it was held that a burden placed (in substance) on the first seller in the state of imported petroleum, was in truth, though not in form, a sort of tax or impost; so regarded it clearly infringed sect. 92, though its operation and incidence only took effect at an interval after the border was passed. The earlier case of *Ex p. Nelson No. (1)* (17), may be contrasted with the case of *Tasmania v. Victoria* (18). In the latter case the validity of a Victorian proclamation was attacked; the proclamation absolutely prohibited the importation into Victoria of potatoes from Tasmania; it was held to be invalid not only because it was unauthorised by the state Act under which it purported to be made, but because it contravened sect. 92; it directly and absolutely put an end to the trade in potatoes between those states. It was said at p. 168 in the judgment of GAVAN DUFFY, C.J., EVATT and McTIERNAN, JJ.:

In the present case it is neither necessary nor desirable to mark out the precise degree to which a state may lawfully protect its citizens against the introduction of disease, but, certainly, the relation between the introduction of potatoes from Tasmania into the state of Victoria and the spread of any disease in the latter is, on the face of the Act and the proclamation, far too remote and attenuated to warrant the absolute prohibition imposed.

In *Nelson's* case (17), the Act authorised the proclamation prohibiting, or more correctly restricting the introduction into the state of cattle from a district in another state in which there was reason to believe infectious or contagious disease in stock existed. The High Court was equally divided; the view which prevailed that the Act was valid seems to have been based on the ground that the true nature of the legislation was not to restrict freedom of inter-state commerce, but to protect the flocks and herds of New South Wales against contagious and infectious diseases. This view was disputed by the three judges who dissented. In *Tasmania v. Victoria* (18), some of the judges in that case also questioned the correctness of that view while upholding the actual decision on other grounds. It is certainly difficult to read into the express words of sect. 92 an implied limitation based on public policy. It is true that once the cattle or goods have crossed the border, they become liable

to inspection under sect. 112 and also to the state laws of health and sanitation; that circumstance may render the difficulty of principle less important practically. But the question whether in proper cases the maxim *salus populi est suprema lex* could be taken to override sect. 92 is one of great complexity. Their Lordships in this case will accordingly follow the example set by this Board in *James v. Cowan* (5) and treat the question as reserved until it arises, if it ever does. This survey of the cases, as it is, inevitably brief and incomplete, has been undertaken simply in order to show that the propositions laid down in *McArthur's* case (1), which are the foundation of the respondents' argument that sect. 92 does not bind the Commonwealth, were not merely novel when first enunciated, but have not been applied by the High Court in practice in subsequent decisions, though re-affirmed from time to time in dissenting judgments.

Before their Lordships proceed to construe the relevant sections of the constitution, they desire to notice the argument that certain Federal statutes have been enacted on the assumption that sect. 92 does not bind the Commonwealth. The Post and Telegraph Act, 1901-1923 contains a great number of detailed regulations with reference to the posting, stamping, delivery and so forth of letters, the transmission of telegrams, etc., including inter-state intercourse. But if freedom is understood in a certain sense, all these matters come within the powers given by sect. 51 (i) and (v) to make laws with respect to trade and commerce and postal and other services. Sect. 98 of the Act calls for special notice: it forbids and makes it an offence subject to specified exceptions to send or carry a letter for reward otherwise than by post. As this provision applies to inter-state as well as intra-state correspondence, it is in one sense a limitation on freedom of intercourse, assuming that term to include correspondence and it may thus be regarded as an interference with trade. Whether that is so or not, it is, however, a limitation notoriously existing in ordinary usage in all modern civilised communities; it does not impede freedom of correspondence, but merely as it were, canalises its course just as "free speech" is limited by well known rules of law. Very much the same is true of the Wireless Telegraph Act, 1905. Nor can it be fairly said that the Secret Commission Act, 1905, interferes with freedom of commerce in any sense in which that term is properly used. It forbids irrespective of any state boundary, objectionable trade practices in inter-state trade. It merely illustrates how the Commonwealth can make laws under sect. 51 (i) with respect to inter-state trade and commerce without infringing sect. 92. The same is true of the Commerce (Trade Description) Act, 1905-1933, which is merely directed to a special form of falsification. The Australian Industries Preservation Act, 1906-1930, is for the repression of destructive monopolies and is aimed at preventing illegitimate methods of trading.

Similarly the Sea Carriage of Goods Act, 1924, which, following the British Act, adopts the Hague Rules, and requires that any bill of lading to which the Act applies must either in fact conform to or must be deemed to conform to the conditions embodied in these rules, does not even render compulsory the issue of a bill of lading; it merely says that if the parties choose to have a bill of lading it must contain or be deemed to contain the prescribed stipulations. The Transport Workers Act, 1928-1929, was discussed in *Huddart Parker, Ltd. v. Commonwealth* (19), where the validity of regulations made under the Act was upheld, the point raised being whether the matter fell within the Commonwealth powers under sect. 51 (i). Sect. 92 was not discussed because it was assumed that sect. 92 did not apply to the Commonwealth. Indeed, as already stated, the question whether sect. 92 applied to the Commonwealth has never been the subject of decision in any case until the present. In the same way *James v. Commonwealth* (20) was decided on other grounds, it being assumed that sect. 92 did not bind the Commonwealth. In the Transport Workers Act, 1928-1929, as in the other like statutes, which need not be further here enumerated or discussed, there was no question of interference with freedom in passing across the state borders; they merely illustrate the width of the powers given by sect. 51 (i). On the other hand, the Dairy Produce Act, 1933-1935, raises exactly the same issue as that raised in this case in respect of the Dried Fruits Act, 1928-1935. It is now convenient to examine the actual language of the constitution so far as relevant, in order to ascertain its true construction. The first question is what is meant by "absolutely free" in sect. 92. It may be that the word "absolutely" adds nothing. The trade is either free or it is not free. "Absolutely" may perhaps be regarded as merely inserted to add emphasis. The expression "absolutely free" is generally described as popular or rhetorical. On the other hand "absolutely" may have been added with the object of excluding the risk of partial or veiled infringements. In any case the use of the language involves the fallacy that a word completely general and undefined is most effective. A good draftsman would realise that the mere generality of the word must compel limitation in its interpretation. "Free" in itself is vague and indeterminate. It must take its colour from the context. Compare, for instance, its use in free speech, free love, free dinner and free trade. Free speech does not mean free speech; it means speech hedged in by all the laws against defamation, blasphemy, sedition and so forth; it means freedom governed by law as was pointed out in *McArthur's* case (1). Free love, on the contrary, means licence or libertinage, though even so there are limitations based on public decency and so forth. Free dinner generally means free of expense, and sometimes a meal open to anyone who comes, subject however to his condition or behaviour not being objectionable.

Free trade means in ordinary parlance freedom from tariffs. Free in sect. 92 cannot be limited to freedom in the last-mentioned sense. There may at first sight appear to be some plausibility in that idea, because of the starting point in time specified in the section, because of the sections which surround sect. 92 and because the proviso to sect. 92 relates to customs duties. But it is clear that much more is included in the term; customs duties and other like matters constitute a merely pecuniary burden; there may be different and perhaps more drastic ways of interfering with freedom, as by restriction or partial or complete prohibition of passing into or out of the state. Nor does "free" necessarily connote absence of discrimination between inter-state and intra-state trade? No doubt conditions restrictive of freedom of trade among the states will frequently involve a discrimination; but that is not essential or decisive. An Act may contravene sect. 92 though it operates in restriction both of intra-state and of inter-state trade. A compulsory seizure of goods such as that in *James v. Cowan* (5) may include indifferently goods intended for intra-state trade and goods intended for trade among the states. Nor can freedom be limited to freedom from legislative control; it must equally include executive control.

Then there is the conception enunciated in *McArthur's* case (1) that "free" means free from every sort of impediment or control by any organ of government, legislature or executive to which sect. 92 is addressed with respect to trade, commerce or intercourse, considered as trade, commerce and intercourse. The scope of this view has already been indicated. It involves a conception of inter-state trade, commerce and intercourse commencing at whatever stage in the state of origin the operation can be said to begin and continuing until the moment in the other state when the operation of inter-state trade can be said to end; the freedom is postulated as attaching to every step in the sequence of events from first to last. Now it is true that for purposes of sect. 51 (i), the legislative powers of the Commonwealth may attach to the whole series of operations which constitute the trade in question, once it has fallen into the category of inter-state trade; hence the various Acts to some of which reference has been made here. But when it is sought to apply this to sect. 92, difficulties at once arise. It seems in practice only to have been so applied in *McArthur's* case (1), and it is doubtful if it was so applied even there, but it has been rejected in *Roughley's* case (11) and in *Vizzard's* case (12) and the other transport cases. But even in *McArthur's* case (1) it was recognised that such freedom was qualified; the analogue of freedom of speech was there taken, but it has already been explained what limitations that involves. Nor is help to be derived from speaking of freedom of trade as trade; as well speak of freedom of speech as speech. Every step in the series

of operations which constitute the particular transaction is an act of trade; and control under the state law of any of these steps must be an interference with its freedom as trade. If the transaction is one of sale, it is governed at every stage, from making the contract until delivery, by the relevant Sale of Goods Act. If it is a bill of exchange, similarly the Bills of Exchange Act applies. If it involves sea, railway or motor carriage, relevant Acts operate on it; it is subject to executive or legislative measures of state or Commonwealth dealing with wharfs or warehouses or transport workers. It must be so subject. Otherwise the absurd result would follow that the inter-state operation of trade would be immune from the laws of either state, of the state of origin equally with the other state. There would thus be in every state a class of dealings and acts entirely immune from the general law of the state, though only distinguishable from other like dealings and acts by the fact that they are parts of an inter-state transaction. It is to avoid this paradox, that it was said that the gap can only be filled up by the Commonwealth—a point for the moment reserved. But if freedom is to be found in practice the line must be drawn somewhere. If no help is to be got from the formula “trade and commerce as such,” neither can it be found by saying that freedom under sect. 92 is applied to acts not persons. For instance, it is said, a man may be arrested for crime while about to cross the frontier in the course of a trade operation, and that is no infringement of sect. 92. That is true enough, but not very helpful; trade no doubt consists of acts (including documents), but acts imply persons who perform or create them even if only to work the necessary machines. Nor is much help to be got by reflecting that trade may still be free, though the trader has to pay for the different operations, such as tolls, railway rates, freight and so forth. Nor has it been suggested that sect. 92 bars the seller’s ordinary right of stoppage *in transitu* if the sale is inter-state.

If no definite delimitation of the relevant idea of freedom is to be derived from these considerations, in particular, if the formula freedom of trade “as such” is not sufficient, where is the line to be drawn and where is the necessary delimitation to be found? The true criterion seems to be that what is meant is freedom as at the frontier or, to use the words of sect. 112, in respect of “goods passing into or out of the state.” What is meant by that needs explanation. The idea starts with the admitted fact that federation in Australia was intended (*inter alia*) to abolish the frontiers between the different states and create one Australia. That conception involved freedom from customs duties, imports, border prohibitions and restrictions of every kind; the people of Australia were to be free to trade with each other and to pass to and fro among the states without any burden, hindrance or restriction based merely on the fact that they were not members of the same state. But

it has become clear from the various decisions already cited that such burdens and hindrances may take diverse forms, and indeed appear under various disguises. One form may be a compulsory acquisition of goods, as in *James v. Cowan* (5), or the *Peanut* case (15), if in truth the expropriation is directed wholly or partially against inter-state trade in the goods, that is, against selling them out of the state. Another form may be that of placing a special burden on the goods in the state to which they have come, simply because they have come from the other state, as in the *Vacuum Oil* case (16). More obvious cases are those of undisguised restrictions on passing from state to state. The actual restraint or burden may operate while the goods are still in the state of origin, as in the case of a compulsory expropriation or a standstill order, or it may operate after they have arrived in the other state, as in the *Vacuum Oil* case (16). In every case it must be a question of fact, whether there is an interference with this freedom of passage. Their Lordships are of opinion that this construction is not inconsistent with any decided case, with the doubtful exception of *McArthur's* case (1). As a matter of actual language, freedom in sect. 92 must be somehow limited, and the only limitation which emerges from the context and which can logically and realistically be applied is freedom at what is the crucial point in inter-state trade, that is at the state barrier.

This construction also makes sect. 51 (i) consistent with sect. 92, so far as concerns the Commonwealth, who in their Lordships' judgment, as they will now state, are bound by sect. 92 equally with the states. So far as the language of the section goes, no countenance is afforded for the contrary view. The language is quite general. It is in terms not subject to any exception or limitation. It is the declaration of a guaranteed right; it would be worthless if the Commonwealth was completely immune and could disregard it by legislative or executive act. It is difficult if not impossible to conceive that anyone drafting a statute, especially an organic statute like the constitution, would have written out sect. 92 in its present form, if what was intended was a constitutional guarantee limited to the states, but ineffective so far as regards the Commonwealth. Sect. 92 is found in a series of sections which deal both with the Commonwealth and the states; indeed the proviso to sect. 92 directly applies to the Commonwealth. The constitution when it is enacting a section which is only to apply either to the Commonwealth or to the states exclusively, indicates that intention in clear terms, as in sects. 98, 99, 100, 102, 116, which specifically relate to the Commonwealth, and sects. 111, 112, 113, 114 and 115. It is true that there are certain sections which deal specifically with the trade and commerce power of the Commonwealth, in particular sects. 98, 99, 100, though these sections do not either individually or

collectively cover the same ground as sect. 92 ; there are also other sections which relate specifically to the trade powers of the states, in particular sects. 112 (inspection laws) and 113 (liquor laws). None of these sections, however, directly help in the construction of sect. 92.

The real argument on which the theory is based that sect. 92 does not bind the Commonwealth is that sect. 92 if it applied to the Commonwealth would nullify or practically nullify sect. 51 (i). If that were so, the same would be true of various other heads in sect. 51. That was the theory expounded in *McArthur's* case (1). Their Lordships have explained why they reject that theory. They will only add a few observations. One is that though trade and commerce mean the same thing in sect. 92 as in sect. 51 (i), they do not cover the same area, because sect. 92 is limited to a narrower context by the word "free" ; the critical test of the scope of sect. 92 is to ascertain what is meant by "free" ; their Lordships have sufficiently stated, and will not repeat, their opinion on that point. But if that theory enunciated in *McArthur's* case (1) fails, the only substantial argument for the respondents' contention fails. It may further be observed in reference to the contention that there is antinomy between sect. 92 and sect. 51 (i), that the same antinomy would arise between sect. 92 and sect. 107. By sect. 107 every state power is saved, unless it is exclusively vested in the Commonwealth or withdrawn from the Parliament of the state. Sect. 51 (i) does not give exclusive powers to the Commonwealth. Each state has therefore the full power except where sect. 109 applies, to interfere with inter-state freedom, within its own territory and at its border ; hence if sect. 92 were construed as the respondents contend, there would be exactly the same antinomy in regard to the states ; the only difference would be that sect. 51 (i) is express ; but that is immaterial because both sects. 51 (i) and 107 are expressly subject to the constitution and the latter section imports every state power as fully as if specifically set out, whereas the Commonwealth only possesses powers expressly conferred. There could be no question in regard to the Commonwealth of powers withdrawn.

For these reasons their Lordships are of opinion that sect. 92 binds the Commonwealth. On that footing it seems to follow necessarily that the Dried Fruits Act, 1928-1935, must be held to be invalid. On the interpretation of "free" in sect. 92, the Acts and the regulations either prohibit entirely, if there is no licence, or if a licence is granted, partially prohibit inter-state trade. Indeed the contrary was but faintly contended if the Commonwealth were held to be bound by the section. The conclusion of the matter is that in their Lordships' judgment sect. 92 applies to the Commonwealth and that being so, the Dried Fruits Act and regulations should be declared invalid as contravening sect. 92. The result is that in their Lordships' judgment the Common-

wealth should be held to have failed in its attempt by the method adopted under the Act in question to control prices and establish a marketing system, even though the Commonwealth Government are satisfied that such a policy is in the best interests of the Australian people. Such a result cannot fail to cause regrets. But these inconveniences are liable to flow from a written constitution. Their Lordships cannot arrive at any conclusion save that they could not give effect to the respondents' contention consistently with any construction of the constitution which is in accord with sound principles of interpretation. To give that effect would amount to re-writing, not to construing, the constitution. That is not their Lordships' function. The constitution, including sect. 92, embodied the will of the people of Australia, and can only be altered by the will of the people of Australia expressed according to the provisions of sect. 128.

Though their Lordships are reversing the decision of the High Court, they do so with the greatest respect for the opinions of the distinguished judges who have thought differently, and they do so with peculiar diffidence and reluctance on a constitutional matter. They have, however, the consolation that they are giving effect to the declared opinion of three of the five judges of the High Court who sat in this case, while the other two seemed to indicate that their individual opinions tended the same way. But all five judges thought they should follow what had been regarded as the law in the High Court for many years, and leave its reconsideration to the Judicial Committee, where, as stated in *James v. Cowan* (5), it was an open question, and must here be dealt with on that footing. Their Lordships wish to express their appreciation of the help given to them by the counsel who have argued in this appeal, in particular the Attorney-General for the Commonwealth, the merit of whose admirable argument is in no way diminished because it has not succeeded.

In the result the appeal, in their Lordships' judgment, should be allowed, the demurrer should be overruled and the matter remitted for trial to the High Court. The respondents should pay the appellant's costs and bear their own costs of the hearing below and of this appeal. The interveners will bear their own costs. Their Lordships will humbly so advise His Majesty.

Solicitors : *Justice & Pattenden* (for the appellant) ; *Coward, Chance & Co.* (for the respondents) ; *Galbraith & Best* (for the State of Tasmania and the State of Western Australia) ; *Light & Fulton* (for the State of New South Wales and the State of Queensland) ; *Freshfields, Leese & Munns* (for the State of Victoria).

[Reported by S. P. KHAMBATTA, ESQ., Barrister-at-Law.]

Re HORDER, *Ex parte* THE TRUSTEE.

[CHANCERY DIVISION (Clauson, J.), July 13, 1936.]

Bankruptcy—Procedure—Recovery of debt incurred by bankrupt on behalf of another—Bankruptcy Act, 1914 (c. 59), s. 105.

The trustee in bankruptcy of a certain bankrupt alleged that the bankrupt had incurred a number of his debts on behalf of the respondents and he applied by motion in bankruptcy for a judgment against them to indemnify the bankrupt's estate against such debts. The respondents objected that the case ought to be tried by the common law courts in the usual manner:—

HELD: notwithstanding the wide jurisdiction conferred upon the court in bankruptcy by the Bankruptcy Act, 1914, s. 105, the practice had grown up of leaving to the ordinary tribunal cases which did not raise bankruptcy points, and in the present case the ordinary procedure ought to be adopted.

[EDITORIAL NOTE.] This is a test of the limits of the bankruptcy jurisdiction. Claims by the trustee against third parties must be enforced in the common law courts. Here the debts of the bankrupt were debts incurred by the bankrupt as a nominee for third parties, and it was sought to show that the real debtors were liable to indemnify the bankrupt. This matter is outside the bankruptcy jurisdiction.

AS TO JURISDICTION OF BANKRUPTCY COURT OVER STRANGERS TO THE BANKRUPTCY, see HALSBURY, *Hailsham Edn.*, Vol. 2, p. 186, para. 254; and FOR CASES, see DIGEST, Vol. 4, pp. 40-45, Nos. 346-381.]

Cases referred to:

- (1) *Ellis v. Silber* (1872), 8 Ch. App. 83; 5 Digest 978, 8000.
- (2) *Re Pollard, Ex p. Dickinson* (1878), 8 Ch. D. 377; 4 Digest 43, 369.

MOTION for a declaration that the respondents were liable to indemnify the bankrupt's estate in respect of certain debts, and for an order for an account between the respondents and the trustee to ascertain the amount of the bankrupt's debts. The bankrupt was adjudicated on his own petition on Sept. 25, 1935. The trustee alleged that in 1934 the first respondent was treasurer and the second respondent was president of the People's Empire Council and that the bankrupt was employed by them and incurred liabilities on behalf of them. The first respondent submitted that the trustee should have proceeded by action and not by motion in bankruptcy.

Constantine Gallop, for the trustee: The whole of the bankrupt's debts are really debts of the respondents. The jurisdiction of the court to deal with this matter is to be found in the Bankruptcy Act, 1914, s. 105. The various judicial decisions on this section lay down the principle that if the trustee is claiming by a higher title than the debtor, the court in bankruptcy will assume jurisdiction; but if the claim is a mere money demand the matter is then one for the common law courts and the court in bankruptcy will not assume jurisdiction. So far as the present case is concerned the court has ample jurisdiction to

deal with it and it will be both cheaper and fairer to the parties to do so.

C. N. Tindale Davis and *G. O. Slade*, for the first respondent, were not called upon. The second respondent was not represented.

CLAUSON, J.: The bankrupt seems to have acted in connection with a somewhat amorphous body, the People's Empire Council, the leading lights of which were the two respondents to this motion, and the trustee in bankruptcy seems disposed to take the view that the bulk of the debts which the bankrupt has incurred were debts for which he became responsible as a mere name, and there is certainly some *prima facie* ground for this view. In these circumstances the matter is a serious one for the two respondents, and it appears from reading the documents in this case that matters other than these merely monetary ones may come into consideration. The trustee is applying by motion for a judgment against the respondents to indemnify the estate against these claims, and the respondents object that this case is one that ought to be tried by the common law courts in the usual manner.

This court has a very wide jurisdiction under the Bankruptcy Act, 1914, s. 105. That jurisdiction, originally conferred by the Bankruptcy Act, 1869, has been referred to by LORD SELBORNE, L.C., in the House of Lords in *Ellis v. Silber* (1), in certain terms which are very well known to those experienced in bankruptcy practice and to which I will not further allude, and has been also referred to by SIR GEORGE JESSEL, M.R., in *Ex p. Dickin* (2). Far be it from me, especially in view of LORD SELBORNE's observations, to say one single word which could possibly be construed as limiting the court's jurisdiction in any way. I observe, however, that during the last fifty years there has grown up a practice, which I will not attempt to define in words, by which the court in bankruptcy has not hesitated to exercise its jurisdiction in cases raising bankruptcy points, while at the same time there is another class of case in which the court has left matters to be determined by the ordinary tribunal. I do not propose to go into the reasons for this, but as matters stand at present, there seems to be a great deal of practical convenience in allowing this practice to continue.

In the present case the respondents seem to me to be not unreasonably taking up the attitude that the ordinary procedure should be adopted, and I do not propose to interfere with that course being taken. I shall give an opportunity to the trustee to bring an action to raise the issue which it has been sought to have tried on the motion; and I order that the motion stand over generally, and that if an action be started by the trustee within three months the motion shall not be restored until the action has been dealt with or disposed of; and that if no action be brought within three months the respondents shall have liberty to

apply with regard to the costs; and that if the action go to trial the costs of the parties be dealt with by the judge; and that if no action is started by the trustee within three months the motion shall stand over generally.

Solicitors: *Laytons* (for the trustee); *Ford, Michelmore, Rose & Wilkins* (for the first respondent).

[Reported by REGINALD TOWNSEND, ESQ., *Barrister-at-Law.*]

STEWART v. SASHALITE, LTD.

[KING'S BENCH DIVISION (Branson, J.), July 29, 1936.]

Companies—Contract for services and transfer of rights—Payment “out of first profits in priority to all dividends.”

In consideration of services rendered and of the transfer of certain rights to the company by him, the company agreed as purchasers “to pay to [the plaintiff] out of the first profits of the purchasers and in priority to all dividends payable in respect of any shares in the purchasers’ capital the sum of £1,000.” The balance sheet of the company, for the year ending Mar. 31, 1935, showed a profit of £698 11s. 10d., which sum the directors used for writing off preliminary expenses and in making a transfer to certain reserve accounts. The plaintiff contended that the £698 11s. 10d., being the first profit of the defendant company, he was entitled to payment of that sum in part satisfaction of the £1,000; and that the company by the publication of the balance sheet were estopped from denying that the £698 11s. 10d. was a first profit:—

HELD: upon the true construction of the contract the words “the first profits in priority to all dividends” mean profits available for dividends; and the test is whether the purpose to which the directors have applied the sum in dispute is one to which the shareholders could not object if such application deprived them of what would otherwise have been a dividend.

[EDITORIAL NOTE.] This is a case where the parties have made remuneration dependent upon the “profits” of a company without in their agreement defining the word “profits.” Not a little of the difficulty in deciding a matter of this nature arises from the fact that much of the authority upon it deals with the deductions of certain tax payments in the determination of what are profits or net profits. Here the question is what are profits distributable for dividend in the sense whether directors are entitled to the detriment of an employee to write off the preliminary expenses of the promotion of a company or similar non-recurring expenditure or to place profits to a reserve fund in accordance with the provisions of articles of association. The latter of course, allow this to be done, but do not make it imperative.

AS TO PROFITS AVAILABLE FOR DIVIDEND, see *HALSBURY*, Hailsham Edn., Vol. 5, pp. 393, 394, para. 648, and FOR CASES, see *DIGEST*, Vol. 9, pp. 544, 545, Nos. 3594-3600.]

Cases referred to:

- (1) *Lee v. Neuchatel Asphalte Co.* (1889), 41 Ch. D. 1; 9 Digest 588, 3936.
- (2) *Vulcan Motor & Engineering Co. v. Hampson*, [1921] 3 K.B. 597; 9 Digest 545, 3595.

- (3) *Patent Castings Syndicate, Ltd. v. Etherington*, [1919] 2 Ch. 254 ; 9 Digest 545, 3599.
- (4) *Long Acre Press, Ltd. v. Odhams Press, Ltd.*, [1930] 2 Ch. 196 ; Digest Supp.
- (5) *Fisher v. Black & White Publishing Co.*, [1901] 1 Ch. 174 ; 9 Digest 602, 4021.

ACTION for £698 11s. 10d. alleged to be due under a contract between the parties, dated Dec. 20, 1930.

The defendant company was formed in 1930 for the manufacture of a flash lamp used in photography. In consideration of services rendered by the plaintiff in the flotation of the company, the defendants, in an agreement dated Dec. 20, 1930, agreed to pay to him £1,000 "out of the first profits of the company and in priority to all dividends payable in respect of any shares in the capital of the company." The company's balance sheet for the year ending Mar. 31, 1935, showed a balance of £698 11s. 10d. to the credit of the profit and loss account. The directors applied this profit as to part in writing off the company's preliminary expenses and as to the remainder in placing it into the patents reserve account. The plaintiff claimed the £698 11s. 10d. on account of the £1,000 due to him under the agreement of Dec. 20, 1930.

W. L. McNair for the plaintiff.

James Wylie for the defendants.

BRANSON, J. : This action raises a neat point, in the following way : By clause 6 of an agreement dated Dec. 20, 1930, the defendants, Sashalite, Ltd., agreed to pay to the plaintiff, Mr. Alexander Stewart the sum of £1,000

out of the first profits of the purchasers and in priority to all dividends payable in respect of any shares of the purchasers' capital.

The plaintiff says that £698 11s. 10d. has been earned as the first profits of the defendant company, and that he is entitled to payment of that sum as part of the £1,000. The defence is that the true construction of the agreement is not that the defendants shall pay over any sum which results as a profit balance on the profit and loss account, or even any sum which results in a balance taking the various profit and loss accounts which the company has made during its existence. They say that the intention of the agreement is that Mr. Stewart should be the first person to benefit by way of receipt of profits which would, if he were not there, have gone in dividends to the shareholders.

Now, the question which I have to decide is, what does this agreement mean ? and I find it very difficult to get any help out of the cases which have been cited to me. The actual dispute between these parties is whether the sum of £698 11s. 10d., which is shown as the profit in the balance sheet of Mar. 31, 1935, has got to be paid to the plaintiff, or whether the directors can properly resolve to use it in writing off preliminary expenses and in making a transfer to certain reserve accounts.

What is said on the part of the defence is : " This is a reasonable and prudent thing to do. The preliminary expenses are a book-keeping asset of no value at all, and before one can really say that the company has made a profit they have got to be written off." Also it is said : " The patents and licences are wasting assets, and before it can be said that we have really made a profit, we ought to provide for replacing the waste of capital which is taking place year by year over that asset by effluxion of time." On the contrary, the plaintiff says : " You say in your balance sheet, and you cannot deny that you have in fact made a profit for the year ending in Mar., 1935, of £571, and your previous balance sheet said that you had made a profit of some £126 odd in the year before. That is the first profit that you have made, and I am entitled to have it, by virtue of the agreement."

The cases to which I have been referred are first of all the case of *Lee v. Neuchatel Asphalte Company* (1), the materiality of which is that it shows that it is not necessary for a company to write off the wastage of a wasting asset before it can properly say that it has a profit which it can divide as dividend.

The next case, *Vulcan Motor & Engineering Co. v. Hampson* (2) has again a rather remote application to the present case, because in that case the question was whether a works manager who was entitled to be paid a commission upon the profit earned by the company was entitled to calculate that commission upon the whole earnings of the company, or whether the company was entitled to deduct the amount which, under the statutes in that behalf, it had had to pay for excess profits duty. If any help at all can be got from it, it is only in so far as, in the judgment of WARRINGTON, L.J., as he then was, reference is made to the case of the *Patent Castings Syndicate, Ltd. v. Etherington* (3), and the learned LORD JUSTICE saying, at p. 603 :

In that case the expression used was " net profits," but the net profits were held there to be the amount of the profits divisible amongst the shareholders ;

and he said that the amount which was taken by the Crown for excess profits duty was not divisible amongst the shareholders, and that therefore the manager could not insist upon his commission being calculated upon an amount including the sum so taken by the Crown.

Then what is said, and I think rightly said, is that apart altogether from authorities which have placed certain meanings upon words which are not these words, and in circumstances which are not these circumstances, there is no help to be got out of the authorities at all, and one is driven back to the construction of this particular agreement. I will read again the critical words :

To pay to Mr. Stewart out of the first profits of the purchasers and in priority to all dividends payable in respect of any shares in the purchasers' capital the sum of £1,000,

Now it is to be noted that there is a reference to the payment of dividends, which would be quite unnecessary if the contention urged by the plaintiff is correct. He has got to say : " That is merely *ex abundante cautela*, or is merely an additional warning to the company that they are not to pay any dividends until they have paid this claim." I think, in view of the fact that the question of what are the profits of a company or what may be the profits of a company is a question which involves so much difficulty and so many different answers according to the different circumstances in which the question is propounded, that it is essential in this case to look to all the language which the parties have used ; and I do not think I can pass over the words " in priority to all dividends," as if they were merely an additional precaution, which was quite unnecessary in the circumstances. Reading the whole of the expression together, I think that the fair meaning to be given to it is that when the directors come to consider the payment of a dividend they have got to pay out of the money which they would otherwise have used for dividends, £1,000 to the plaintiff, before the shareholders get anything by way of dividend.

It is said that that is not a fair construction to put upon it, because it would leave the plaintiff at the mercy of the majority of the board, who might postpone the payment of the £1,000 for an almost indefinite period. Mr. McNair would not say " to the Greek Kalends," but he said " to the Ides of March " ; but the answer to it is that this company was floated with the intention that the people who were subscribing money to it should get dividends, and the safeguard that Mr. Stewart was getting was that nobody could get a penny by way of dividend out of this company until the £1,000 had been paid. I think it is quite fair to read the whole clause as one, and to hold that its meaning is, as I think I have already said, that the directors, when they have got profits which they would otherwise distribute as dividends, have got first to pay £1,000 to Mr. Stewart. In other words, I think that the meaning of the words " the first profits in priority to all dividends " is that the profits should be profits available for dividends, in the sense in which that expression was construed in the case of the *Long Acre Press, Ltd. v. Odhams Press, Ltd.* (4). I need not refer to any other authority in the matter, but the case of *Fisher v. Black & White Publishing Co.* (5) is another case to the same effect.

Therefore, upon the construction of the clause with which I have to deal, I have come to the conclusion that the plaintiff is not entitled to succeed. It was within the powers of the directors instead of making this sum of £698 available for distribution as dividend, to agree that it should be applied in the way in which it has been applied. It is not said, and so far as I can see it cannot be said, that that application has been made with any sinister motive, or otherwise than in the ordinary

and prudent course of the conduct of the business of this company. Of course, if there was any suggestion of fraud established, or any suggestion that this was being done in order to keep the plaintiff out of his money, different considerations would apply.

I think the position with regard to the ascertainment of profits is as has been well said, if I may say so, by LINDLEY, L.J., in the case of *Lee v. Neuchatel Asphalte Company* (1), at p. 21. He said :

There is nothing at all in the Acts about how dividends are to be paid, nor how profits are to be reckoned ; all that is left, and very judiciously and properly left, to the commercial world. It is not a subject for an Act of Parliament to say how accounts are to be kept ; what is to be put into a capital account, what into an income account, is left to men of business.

If men of business have fairly come to a conclusion as to what proportion of what the company has succeeded in acquiring—to use a neutral term—in the past, should be distributed as dividend, then *prima facie*, the court will not interfere, nor, as it seems to me, would it be proper to interfere with it in the other direction and to say that instead of writing off preliminary expenses or depreciating the book value of wasting assets the company should have regarded the particular sum in question as a profit which it could hand over to somebody who is entitled to the first profits in priority to all dividends being paid. I think that the reference to the priority to dividends indicates that the question to be considered is whether the directors have used this money in a way of which shareholders could not complain if it was not distributed as dividends, but applied in the way in which it is suggested that it should be applied. The plaintiff is amply safeguarded, because nobody who has invested money in this company can get a penny for dividends upon his shares until the plaintiff's claim is satisfied, and I think that this action is premature, and I must enter judgment for the defendants, and with costs.

Solicitors : *Barnes & Butler* (for the plaintiff) ; *Godfrey Warr & Co.* (for the defendants).

[Reported by FRANK ROWE, ESQ., Barrister-at-Law.]

Re WHITE-POPHAM SETTLED ESTATES.

[COURT OF APPEAL (Lord Wright, M.R., Romer and Greene, L.JJ.),
July 30, 1936.]

Settlements—Settled land—Sale or mortgage—To raise money for payment of debts of tenant for life—Repayment secured by life policy—Jurisdiction of court to sanction—Settled Land Act, 1925 (c. 18), s. 64.

A tenant for life applied to be allowed to raise a sum by sale or mortgage of the settled land, in order to pay his debts and pay the first premium on a life policy to be assigned to the trustees, the arrangement being that the subsequent premiums should be paid during the life of the tenant for life out of the income and that the capital sum should be re-imbursed by the payment of the policy moneys on the death of the tenant for life. EVE, J., held that there was no jurisdiction under the Settled Land Act, 1925, s. 64, to approve the scheme. On appeal:—

HELD: the court had jurisdiction to approve this scheme under the section, because the transaction was for the benefit of one of the persons interested under the settlement.

[EDITORIAL NOTE.] The question here is the extent of the jurisdiction of the court under the Settled Land Act, 1925, s. 64, which was a new provision in 1925. The terms of the first subsection are very wide and the question of construction would appear to be one of how far the general terms of that subsection are limited by the particularisation of certain transactions in the second subsection. It is very helpful that schemes such as that allowed here, where they are properly safeguarded, as this is, should be found within the section.

FOR THE SETTLED LAND ACT, 1925, s. 64, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 17, p. 898; AND FOR A PREVIOUS CASE REFERRING TO THE SECTION, see DIGEST, Vol. 40, p. 773, No. 3045]

APPEAL by the applicant from an order made by EVE, J., on July 28, 1936, dismissing his application to the court to approve a scheme.

By a deed of resettlement dated July 1, 1924, Mr. F. C. Popham-Macpherson, the applicant and appellant, settled land on trustees to his own use for life and afterwards to certain persons in tail. The tenant for life, having incurred liabilities, applied by originating summons dated May 19, 1936, to the court to approve the following scheme, under the Settled Land Act, 1925, s. 64:

(a) That there shall forthwith be raised by sale or mortgage of all or some part or parts of the above-mentioned settled estates a sum of £6,500 and that such sum shall be applied by the said trustees first in paying the costs of all parties to this application . . . and secondly in paying the first year's premium on the policy of insurance hereinafter mentioned, and thirdly as to the balance of the said sum in paying the same to . . . the applicant's solicitors on their undertaking to apply the same in paying the debts of the applicant amounting together to £6,230 9s. 6d.

(b) That the said sum of £6,500 shall be raised and applied as aforesaid on the terms and conditions following, namely: (i) that the applicant shall effect and vest in the said trustees upon the trusts of the said resettlement a policy of assurance for £7,000 on his life; (ii) that the premiums on the said policy of assurance shall be charged on and made payable by the trustees for the time being of the said resettlement out of the net rents and profits of the said settled estates accruing

during the lifetime of the applicant in priority to all other payments thereof or estates or interests therein arising under the said resettlement ; and (iii) that the applicant shall execute in favour of the said trustees a deed of assignment [in a specified form].

Sect. 64 of the Act reads as follows :

(1) Any transaction affecting or concerning the settled land, or any part thereof, or any other land (not being a transaction otherwise authorised by this Act, or by the settlement) which in the opinion of the court would be for the benefit of the settled land, or any part thereof, or the persons interested under the settlement, may, under an order of the court, be effected by a tenant for life, if it is one which could have been validly effected by an absolute owner.

(2) In this section "transaction" includes any sale, extinguishment of manorial incidents, exchange, assurance, grant, lease, surrender, reconveyance, release, reservation, or other disposition, and any purchase or other acquisition, and any covenant, contract, or option, and any application of capital money (except as hereinafter mentioned), and any compromise or other dealing, or arrangement ; but does not include an application of capital money in payment for any improvement not authorised by this Act, or by the settlement ; and "effected" has the meaning appropriate to the particular transaction ; and the references to land include references to restrictions and burdens affecting land.

The point at issue was whether this scheme was a transaction concerning the settled land within the meaning of the section. The persons entitled in succession and the trustees offered no opposition if the court should find jurisdiction to approve the scheme. EVE, J., could not find jurisdiction, as he considered that the transaction affected, not the settled land, but the money lent on a mortgage or realised by a sale of the land. The applicant appealed.

W. T. Elverston for the applicant, the tenant for life.

A. C. Nesbitt for the trustees and certain adult beneficiaries.

W. S. Wigglesworth for the remaining adult beneficiaries.

G. D. Johnston for the infant beneficiaries.

LORD WRIGHT, M.R. : [His Lordship stated the facts.] All the necessary parties are in court and it is not disputed by anyone that this transaction was one which it was desirable to carry out. It is certainly desirable in the interests of the applicant and, in a secondary sense, it is desirable in the interests of the other parties interested that the applicant should not be made bankrupt. The only question, therefore, is whether the court has jurisdiction under the section. In my opinion it has. First of all, this is a transaction affecting or concerning settled land. It is not, of course, for the benefit of the settled land, because it involves, subject to the reinstatement of the value which will follow on the death of the applicant, in the first instance a diminution in the amount of the settled land. But it is for the benefit of the persons interested under the settlement—namely for one of them, the tenant for

life, and that in my opinion is sufficient to bring the case within the words of the section.

Mr. Johnston has relied on the qualifying paragraph—

(not being a transaction otherwise authorised by this Act or by the settlement) —

and he says that a mere sale or mortgage of the land by the tenant for life would be authorised by the Act, if not by the settlement. That in my opinion is a misconception, because the transaction proposed, which concerns settled land, is to be looked at as a whole; and looked at as a whole this transaction is clearly one which requires the sanction of the court. For these reasons I think that the appeal should be allowed and the order should be made for which the applicant asks.

ROMER, L.J. : I agree.

GREENE, L.J. : I agree.

Solicitors : *Robins, Hay & Waters*, agents for *Batten & Co.*, Yeovil (for the appellant, the tenant for life, the respondent trustees, and the adult persons beneficially interested in remainder); *Long & Gardiner* (for the respondent infants).

[Reported by DEREK H. KITCHIN, Esq., *Barrister-at-Law.*]

NOTE.

KULUKUNDIS *v.* NORWICH UNION FIRE INSURANCE SOCIETY.

[Reported p. 242 *ante*.

Further application **June 30, 1936.**]

H. U. Willink, K.C., and *Cyril Miller*, for the appellants, applied to the Court of Appeal that interest might be allowed upon the sum recovered upon a policy of marine insurance from the date of the loss which was Dec. 23, 1933.

C. T. Le Quesne, K.C., and *W. L. McNair*, for the respondents, objected that interest was not usually allowed where it was reasonable for the insurers to contest the liability and in any event interest should only be allowed from a date giving a reasonable opportunity to investigate the claim and at a commercial rate.

The court allowed interest at 4 per cent. from Mar. 1, 1934.

Re GATTI'S VOLUNTARY SETTLEMENT TRUSTS, DE VILLE v. GATTI.

[CHANCERY DIVISION (Farwell, J.), **July 10, 1936.**]

Trusts—Settlement—Absolute gift—Restrictions on enjoyment—Failure of trusts—Destination of trust fund.

By a settlement it was provided that the trustees should stand possessed of the trust fund "in trust to divide it into seven equal shares and to appropriate one of such shares to each of the settlor's children," and it was further provided that: "The shares so directed to be appropriated to the settlor's said respective children shall not vest absolutely in them but shall be retained by the trustees and held upon the trusts" thereafter declared. The income of each share was to be paid to the children during their respective lives, subject to determination on bankruptcy or assignment, and on the death of a life tenant the share was to be held in trust for the children of the life tenant as therein provided. In the event of a life tenant having no children a power of appointment by will was given to such life tenant of the share "given to such life tenant." The trustees were given power on the marriage of a life tenant to settle upon certain trusts all or any part of the trust fund given to such life tenant. One of the children died a bachelor and without having exercised his power of appointment by will. A summons was taken out to determine whether his share formed part of his estate, or whether being undisposed of, there was a resulting trust in favour of the settlor:—

HELD: upon a consideration of the settlor's intention as indicated in the settlement, there was an absolute gift in the first instance, and applying the rule in *Lassence v. Tierney* (1), and *Hancock v. Watson* (2), the share passed to the child's estate.

[EDITORIAL NOTE. The present case is in the judgment carefully distinguished from the decision of *ASTBURY, J.*, in *Re Payne* (3), where the opposite decision was arrived at. The distinction between the cases is that in the present case by looking at clause 7 of the will, the judge was convinced that the testator intended the tenant for life to take absolutely in the first instance.

FOR A STATEMENT OF THE RULE, see *HALSBURY*, 1st Edn., Vol. 28, Wills, p. 674, para. 1289; and FOR CASES, see *DIGEST*, Vol. 37, pp. 121, 122, Nos. 533-545.]

Cases referred to:

- (1) *Lassence v. Tierney* (1849), 1 Mac. & G. 551; 43 Digest 643, 790.
- (2) *Hancock v. Watson*, [1902] A.C. 14; 43 Digest 644, 792.
- (3) *Re Payne, Taylor v. Payne*, [1927] 2 Ch. 1; 43 Digest 644, 798.
- (4) *Re Marshall, Graham v. Marshall*, [1928] Ch. 661; 43 Digest 645, 799.

ADJOURNED SUMMONS for the determination of a question as to the destination of a one seventh share of certain property settled by Sir Joannes Maria Aemilius Gatti on his son Cecil Frank Gatti.

On Jan. 30, 1923, the settlor, who subsequently died on Sept. 14, 1929, executed a deed of settlement which (so far as is material to the present proceedings) provided as follows:

Whereas the settlor is absolutely entitled to 2,800 shares of £5 each of and in the undertaking known as the Charing Cross West End Electricity Supply Company, Ltd., and has transferred the same into the names of the trustees (i.e., of the settle-

ment) to the intent that the same shall be held upon the trusts and subject to the powers and provisions hereinafter declared and expressed.

1. The trustees shall with the consent of the settlor during his life and after his death at their discretion sell the property hereby settled or any part thereof and shall with the like consent and the like discretion invest the moneys produced thereby in the names or under the legal control of the trustees in or upon any investments hereby authorised with power with such consent or at such discretion as aforesaid to vary or transpose any investments for or into others of any nature hereby authorised.

2. The trustees shall stand possessed of the capital and income of the property hereby settled and the investments for the time being representing the same (hereinafter called "the trust fund") in trust to divide the same into seven equal shares and to appropriate one of such shares to each of the settlor's children John Agostino Stefano Gatti Ida Julia Gatti Joan Lydia Gatti Austen Stephen Gatti Stephen Geoffrey Gatti Cecil Frank Gatti and Elaine Henrietta Gatti.

3. The shares so directed to be appropriated to the settlor's said respective children shall not vest absolutely in them but shall be retained by the trustees and held upon the trusts hereinafter declared concerning the same respectively.

4. The trustees shall hold the share of each of the settlor's said children in the trust fund upon trust to pay the income thereof to such child (hereinafter called "the life tenant") during his or her life until in the event of the bankruptcy of the life tenant or of an assignment of or a charge on the said income or any part thereof being executed by the life tenant the said income or some part thereof if belonging absolutely to the life tenant would become vested in or charged in favour of some other person or persons or a corporation and in the case of a daughter of the settlor so that during coverture her right to such income shall be without power of anticipation.

5. After the death of any life tenant the trustees shall stand possessed of the shares of the life tenant and the future income of and in the trust fund in trust for all or such one or more exclusively of the others or other of the children or remoter issue of the life tenant and if more than one in such shares and with such trusts for their respective benefit and such provisions for their respective advancement and maintenance and education at the discretion of the trustees as the life tenant shall by any deed or deeds revocable or irrevocable or by will or codicil appoint and in default of and subject to any such appointment in trust for all or any children or child of the life tenant who being male shall attain the age of twenty-one years or being female attain that age or marry.

7. The trustees may at their discretion at any time during the life of any life tenant either in contemplation of or after his or her marriage settle all or any part of the share of the trust fund hereinbefore given to such life tenant upon such trusts as the trustees shall think fit for the benefit of such life tenant and his or her wife or husband or intended wife or husband and any future wife or husband and any children or remoter issue (whether by his or her then present or intended wife or husband or any future wife or husband) or for the benefit of any such objects and with such ulterior or ultimate trusts and with such other provisions as the trustees shall think fit.

8. If any life tenant shall have no child who being male shall attain the age of twenty-one years or being female shall attain that age or marry then subject to the trusts powers and provisions hereinbefore declared and contained and to the powers by law vested in the trustees and to every exercise of such respective powers the trustees shall stand possessed of the shares of such life tenant in the said trust fund for such person or persons and for such purposes as the life tenant shall by will or codicil appoint.

One of the settlor's children, Cecil Frank Gatti, who was entitled to a one seventh share of the property mentioned in the settlement, died on Mar. 17, 1936, a bachelor and intestate, and the question thereupon arose whether, by reason of his so dying, the share of which he was a life tenant formed part of his estate as a share the trusts of which had failed or resulted to the estate of the settlor, and the summons herein was accordingly taken out.

C. E. Shebbeare, for the plaintiffs, the trustees of the settlement, stated the facts.

F. C. Walmough, for the first defendant, Lady Gatti, the administratrix of the settlor's deceased son, Cecil Frank Gatti: This is a clear case of an absolute gift to the son qualified by certain trusts and therefore the rule in *Lassence v. Tierney* (1), and *Hancock v. Watson* (2) applies, and there is no resulting trust.

R. W. Goff, for the second defendant, the sole executor of the will of the settlor: There is no absolute gift and therefore the rule does not apply. There is no trust for the children or any direction to pay them their shares. The direction to appropriate one of the shares to each of the children is followed immediately by a provision that the shares shall not vest absolutely. Although, where there is an absolute gift in the first instance, a subsequent proviso has been held not to be sufficient to prevent the gift being an absolute one, that does not follow where the words are not in their terms an absolute gift. See *Re Payne, Taylor v. Payne* (3), at p. 4, where a clause very similar to the present one was considered. The basis of that decision was that a direction to appropriate, followed by this particular clause, showed that it was merely administrative machinery. See also *Re Marshall, Graham v. Marshall* (4), where *Re Payne* (3) is distinguished.

FARWELL, J.: The question which I have to determine in this summons is a question of construction arising upon a deed of voluntary settlement made by Sir John Gatti on Jan. 30, 1923, in favour of his children. The question involved is the very familiar one of whether the rule that is known as the rule in *Lassence v. Tierney* (1), and the rule in *Hancock v. Watson* (2), applies. The settlement was made, as I have said, on Jan. 30, 1923, between Sir John Gatti and certain other persons as trustees, and it recites: [His Lordship read the recital and clauses 1 and 2.] Clause 4 provides that the income of each share is to be paid to the children during their respective lives and contains a provision for the determination of such life interests on bankruptcy or assignment. On the death of a life tenant the trustees are to stand possessed of the share of the life tenant in trust for the children of the life tenant as he shall by deed or will appoint and in default of appointment in trust for such children as specified in clause 5 of the settlement. In the event

of a life tenant having no children a power of appointment by will only is given to such life tenant. Then it is material to mention that in clause 7 of the settlement the trustees are given power in contemplation of the marriage of a beneficiary to settle all or any part of the trust fund thereinbefore given to such life tenant upon certain trusts.

What has happened in this case is that one of the sons, Cecil Frank Gatti has recently died, a bachelor, and without having exercised the general power of appointment by will which he was given. The question therefore arises as to whether his share forms part of his estate, or whether it is not disposed of and accordingly there is a resulting trust in favour of the settlor. The rule in *Lassence v. Tierney* (1), and *Hancock v. Watson* (2) is so well known that it is unnecessary to recite it, but this at any rate I think must be remembered that, in order to make room for the application of the rule, it is essential to find in the first place an absolute gift to the person in question. If there is nothing more than, for instance, a direction to set aside a fund and then trusts of the fund are declared, it is probable that in such a case it would be considered the instrument would not be construed as giving an absolute interest in the first instance. But if one is able to find, on the whole of the document, that an absolute interest is given in the first instance, the fact that trusts are declared and that they provide that the share so given is not to be an absolute interest in the donee, but is to be retained by the trustees, is not in itself sufficient to oust the application of the rule.

In the present case, I have got, I think, indications sufficient to show that the intention of the settlor was to make an absolute gift in the first instance. He directs the trustees to stand possessed of the fund in trust to divide the same into seven equal shares and to provide one share for each child. And when one comes to look at the provision in clause 7 the settlor himself seems to indicate what he has done in the earlier part of the settlement, because he refers to the share of each child as the share given to such child, and I think when one reads clause 2 in the light which is thrown upon it by that expression in clause 7, there can be little doubt that the gift in the first instance is an absolute gift, but that the settlor was anxious to see to it that the children did not receive what was given absolutely to him or her, but that it should be retained and held upon certain trusts. In my judgment this case, on the whole, is one which comes within the rule of *Lassence v. Tierney* (1).

I have been referred to a decision of ASTBURY, J., of *Re Payne* (3), in which, on somewhat similar words, he came to the opposite conclusion to that to which I come. I am not suggesting for one moment that the decision of ASTBURY, J., was not a perfectly right decision in that case. But I have here, I think, indications which I do not find in the case before him, of the intention of the settlor to make an absolute gift in the first

instance, and, that being so, I am not, in deciding in the opposite sense to that in which ASTBURY, J., decided, in any way throwing any doubt on his decision. But on the particular document which is before me and which I have to construe, I have come to the conclusion that I ought to decide in a different sense from that in which he decided. Accordingly, I propose to declare that the share of Cecil Frank Gatti, in the events which have happened, has passed to his estate. Costs of all parties as between solicitor and client to come out of that share.

Solicitors : *Gasquet, Metcalfe & Walton* (for all parties).

[Reported by C. M. YOUNG, Barrister-at-Law.]

Re A DEBTOR (No. 15 OF 1936). THE DEBTOR v. THE PETITIONING CREDITOR AND THE OFFICIAL RECEIVER.

[CHANCERY DIVISION (Clauson and Luxmoore, JJ.), **July 27, 1936.**]

Bankruptcy—Married woman—Business debts—Judgment before Aug. 2, 1935—Subsequently increased to £50 by interest—Law Reform (Married Women and Tortfeasors) Act, 1935 (c. 30), s. 4 (1) (c).

The debtor was a married woman who had been carrying on a business of letting furnished flats. She brought an action against the man who later became the petitioning creditor for the return of goods which, it was alleged, she had used in her business. On July 23, 1935, judgment was given to the effect that the goods were the property of the petitioning creditor and the action was dismissed with costs. These costs were taxed at £48 and later by the addition of interest the debt was increased. The Law Reform (Married Women and Tortfeasors) Act, 1935, came into operation on Aug. 2, 1935 :—

HELD : (i) the Law Reform (Married Women and Tortfeasors) Act, 1935, had no application to this case.

(ii) having regard to the terms of the judgment of July 23, 1935, it could not be maintained that the debt was incurred in the course of the debtor's business or in the getting in of the assets thereof, and a receiving order made by the registrar must be discharged.

[EDITORIAL NOTE.] The facts when carefully examined show that the only debt here on Aug. 2, 1935, when the new Act came into force was a judgment debt for less than £50. It became a good petitioning debt after that date by reason of the addition of interest. This debt, however, is apparently saved by the terms of the Law Reform (Married Women and Tortfeasors) Act, 1935, s. 4 (1) (c), and cannot be enforced against a married woman in bankruptcy unless it was so enforceable before the Act by reason of its being a trading debt.

FOR THE LAW REFORM (MARRIED WOMEN AND TORTFEASORS ACT), 1935, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 28, p. 104, and FOR TRADING DEBTS OF MARRIED WOMEN AND BANKRUPTCY, see HALSBURY, Hailsham Edn., Vol. 2, pp. 10, 11, para. 11 ; and FOR CASES, see DIGEST, Vol. 4, pp. 31-33, Nos. 251-274.]

Case referred to :

(1) *Re Reynolds, Ex p. White Bros., Ltd.*, [1915] 2 K.B. 186 ; 4 Digest 33, 274.

APPEAL by the debtor from a receiving order made by the registrar

of the county court of Middlesex, holden at Edmonton. The facts of the case are stated in the judgment.

M. D. Van Oss, for the appellant : This is a question as to the effect of the Law Reform (Married Women and Tortfeasors) Act, 1935, which makes a married woman amenable to the bankruptcy laws. On the facts of this case, the earlier law is applicable and that being so, the debtor must have been carrying on business at all material times for a bankruptcy petition to be founded on the debt in question. The judgment was before the change in the law referred to and therefore unless it could be shown that the debtor (a married woman) was carrying on a trade or business, the matter was governed by the Bankruptcy Act, 1914, s. 125. In this case, the petition states that the debtor was lately carrying on business, but it does not say when "lately" was, nor does it say what the business was. The petition does not say that any debts of the business remain unpaid. The debt on which the petition was founded is not a trading debt, but a debt in respect of the costs of an unsuccessful action for detinue.

L. J. Solley, for the petitioning creditor : If the debt is a trade debt, the Law Reform (Married Women and Tortfeasors) Act, 1935, s. 4, does not prevent its being enforced in bankruptcy. The debtor was carrying on trade at the time, and the debt was a trade debt. The judgment upon which the bankruptcy notice was founded was not of the species of judgment or order referred to in the above sect. 4. It is immaterial whether this is a trading debt or not. The action was brought by the debtor in the course of her business, although the action was misconceived. There were debts outstanding at the time, as is shown by the evidence given at the hearing. [Counsel referred to *Re Reynolds* (1).]

CLAUSON, J. : Mr. Solley, for the respondent, has called our attention to every possible point in support of the decision of the registrar in the court below. So far as I am concerned, I think that this order should be discharged.

The circumstances were these. In the year 1933, the debtor started letting furnished flats, and for that purpose purchased various articles from various firms. Apparently, in July, 1935, she took the view that certain furniture which was in the possession of the petitioning creditor was in fact her property. The furniture in question, I will assume, had been at some time in her possession for the purpose of carrying on this trading business. Taking the view she did, she sued for the return of the furniture. The judge in the King's Bench Division dismissed the action. He said that the furniture had, in fact, ceased to be hers. The petitioning creditor's case was that the furniture had been paid for. The learned judge held that it was not the debtor's. The action was dismissed with costs, which were subsequently taxed at over £48.

On Aug. 2, 1935, the Law Reform (Married Women and Tortfeasors) Act came into operation. It was suggested that that Act had some bearing upon the position. It left the position entirely unaltered. Therefore, in respect of any petition founded upon that judgment, the Bankruptcy Act, 1914, s. 125, applies. That section was repealed by the Act to which I have referred. But, having regard to the Interpretation Act, 1889, it is in force as regards this case, because this matter is an antecedent transaction. In due course, this judgment debt of £48 accumulated to itself certain interest and became £50, and the petitioning creditor presented a bankruptcy petition against the lady. He presented this petition, and it states that she was lately carrying on business. That might be right. The point is: Was she carrying on a trade or business on July 23, 1935, when the judgment was given? There were some proceedings in an attempt to discharge a bankruptcy notice, but I do not propose to deal with them. When the matter came before the registrar, counsel for the petitioning creditor first of all argued that the petitioning creditor's case was that the goods were the debtor's property for the purpose of her trade. But the judgment of HUMPHREYS, J., precludes my saying that the goods were the lady's, because they belong to the petitioning creditor. Then counsel for the petitioning creditor said that it was a trade debt. If the costs had been incurred in getting in a trade asset, the position would have been different. But the costs were incurred in attempting to get in something which was held not to be a trade asset. How a debt in connection with an action which failed in that way can be a trade debt, I cannot understand. I am precluded by the judgment from holding that the assets were hers. It is said that this was an action which she brought and the costs are a trade debt. I am not prepared to agree with that, because it is too wide a proposition. It was put to us that the lady was amenable to the Bankruptcy Act, 1914, s. 125, because some of her trading debts had not been discharged, and it is familiar law—*Re Reynolds* (1) to which counsel referred—that so long as a trader is getting in the assets of the business, she is still trading.

This is a reflection of the old law as to when a trader ceased to be such. It was suggested that there was evidence before the registrar and on that ground the lady was liable. There is no trace in the note whether the registrar considered the matter, but he does find that it is a trade debt, and he does not base his decision on having found that trade debts were still outstanding. To my mind, the evidence is wholly insufficient that trading debts were outstanding. The evidence is contained in a transcript of what the lady said in the action. She had purchased goods from certain shops. It appeared that she had purchased some of these articles. It appeared that counsel put to her, in cross-examination, the question: "Are you going to pay for the down quilt?" She

replied : " I should like it to be handed over to the National Linen Co., the people I owe money to." It is suggested that that is sufficient evidence that she still owed money to the National Linen Co. for goods purchased for the purposes of her trade. It may be, but I cannot hold that anybody's mind was drawn to the point. There is no evidence on which the registrar could find that there were trading debts outstanding. [His Lordship referred further to the evidence.]

The Law Reform (Married Women and Tortfeasors) Act, 1935, is not, in my view material. Accordingly it is necessary in order that a petition should succeed that the Bankruptcy Act, 1914, s. 125, should apply. In my view the registrar was wrong in holding that this judgment for costs was a trading debt and there is nothing to justify him in holding that the lady was brought within sect. 125. The receiving order must be discharged and the petitioning creditor must pay the costs here and below. The petition will be dismissed.

LUXMOORE, J. : I agree.

Leave to appeal refused.

Solicitors : *F. G. Huggett*, Maidenhead (for the appellant); *Henry Miller & Co.* (for the petitioning creditor).

[*Reported by W. K. SCRIVENER, Esq., Barrister-at-Law.*]

ASH AND ANOTHER *v.* HUTCHINSON & CO. (PUBLISHERS), LTD., AND OTHERS.

[COURT OF APPEAL (Slessor, Romer and Greene, L.JJ.), **March 18, 1936.**]

Copyright—Infringement—Conversion—Previous action against author—Judgment for infringement only.

In previous litigation the plaintiffs had sued the author and certain printers and publishers of an infringing work and obtained a judgment giving them damages for infringement and conversion against the printers and publishers, but damages for infringement only against the author. In this action the plaintiffs sued other publishers and printers for infringement and conversion of the same work. The defence was that the defendants and the author were joint tortfeasors and judgment against one was a bar to any relief against the other :—

HELD : (i) the claim against the publishers for infringement was barred by the previous judgment. In this respect they were joint tortfeasors with the author, since they could only authorise the printing by passing on the authority they had received from the author.

(ii) the claim against the publishers for conversion under the Copyright Act, 1911, s. 7, was not barred and an inquiry as to damages was ordered.

(iii) the tort of authorising the printing and the tort of reproduction by printing are separate torts and the claim against the printers for infringement must succeed.

[EDITORIAL NOTE.] So far as this action deals with joint tortfeasors it must now be read subject to the provisions of the Law Reform (Married Women and

Tortfeasors) Act, 1935, s. 6, but so far as it decides which torts are joint torts and which are separate torts it is, of course, quite unaffected by that Act.

AS TO REMEDIES FOR INFRINGEMENT AND CONVERSION, see HALSBURY, Hailsham Edn., Vol. 7, pp. 591-593, paras. 917-919; and FOR CASES, see DIGEST, Vol. 13, pp. 219-220, Nos. 562-573].

Cases referred to :

- (1) *Sutherland Publishing Co., Ltd. v. Carlton Publishing Co., Ltd.*, [1936] 1 All E.R. 177; Digest Supp.
- (2) *Evans v. Hulton (E.) & Co., Ltd.* (1924) 131 L.T. 534; Digest Supp.
- (3) *Falcon v. Famous Players Film Co., Ltd.*, [1926] 2 K.B. 474; Digest Supp.
- (4) *Brinsmead v. Harrison* (1872), L.R. 7 C.P. 547; 43 Digest 531, 668.
- (5) *The Koursk*, [1924] P. 140; 42 Digest 976, 72.

APPEAL from a judgment of FARWELL, J., dismissing the plaintiffs' claim for alleged breach of copyright. The plaintiff, Mr. Ash, was at all material times the beneficial owner of the copyright in a book called **THE PRACTICAL DOG BOOK**, and the plaintiff Mrs. Courtauld was joined because she was from Apr. 25, 1932, to June 7, 1934, the legal owner of such copyright. James Dickie wrote a book called **THE DOG**, which about Aug., 1933, was published by the defendants Hutchinson and Co. (Publishers), Ltd., and printed by the defendants William Brendon and Son, Ltd. It was alleged that the defendants and each of them had by such publishing and printing infringed the copyright of the plaintiffs and been guilty of conversion. An injunction and delivery up of infringing copies were also claimed.

In previous litigation the plaintiffs had sued the author of the infringing book and the Daily Sketch and Sunday Graphic, Ltd., and obtained damages for infringement and conversion; except that there was no judgment against the author for conversion. The defendant publishers in the present action pleaded that the plaintiffs were debarred from succeeding against them by reason of the previous judgment against the author. The printers also pleaded the former judgment and further that they were acting as agents for and on the instructions of their co-defendants, the publishers. The facts and pleadings are fully referred to in the judgments.

FARWELL, J., upon the trial of this action held that the defendants in printing and publishing the book and the author in authorising such printing and publishing committed a joint tort and that the plaintiffs were barred from any remedy for infringement. As to conversion, that was a different cause of action and the remedy there was not barred by the previous proceedings; but it was necessary to show that the acts amounting to conversion had been done without the consent of the true owner and as the plaintiffs had not proved this, the action also failed in that respect. The plaintiffs appealed.

K. E. Shelley and *G. T. Aldous* for the appellants.

Hon. S. O. Henn Collins, K.C., H. S. G. Buckmaster and R. L. Edwards for the respondents.

SLESSER, L.J. : In this action Mr. Edward Ash, as author of, and from June 7, 1934, owner of the copyright in a book, *THE PRACTICAL DOG BOOK*, and the plaintiff Mrs. Constance Cicely Courtauld, as legal owner from Apr. 25, 1932, until June 7, 1934, sue Hutchinson & Co. (Publishers), Ltd., and William Brendon & Son, Ltd., for breach of copyright. By their statement of claim, dated Mar. 18, 1935, the plaintiffs claimed that a book called *THE DOG*, of which James Dickie was the author, Hutchinson & Co. the publishers, and William Brendon & Son the printers, was printed and published in or about Aug., 1933, and that all copies thereof were infringements of the plaintiffs' copyright. They alleged that the defendants, by printing and publishing *THE DOG* in or about Aug., 1933, had infringed the copyright and had been guilty of conversion. They also claimed an inquiry to ascertain the damages sustained by them by reason of such infringement and conversion, and also an injunction and an order for delivery up.

Although in their defence the defendants denied that *THE DOG* was a breach of copyright, by letter dated July 1, 1935, that fact was admitted by both defendants and was not contested at the trial. But the defendants contended, first, that there was no infringement within the Copyright Act, 1911, s. 2 (1), in that by reason of acts done by Mr. Ash on and after Oct., 1933, it could not be said that what otherwise might have been said to be an infringement was done without the consent of the owner of the copyright (a necessary ingredient in infringement), and, secondly, they said that, inasmuch as the plaintiffs had obtained judgment against Mr. Dickie, the author of *THE DOG*, in respect of the same tort they could not now be sued, in that they were joint tortfeasors with Mr. Dickie, the plaintiffs having elected to proceed and sign judgment fully satisfying the tort against Mr. Dickie and others in an earlier action. They also denied conversion and raised the defence of estoppel, but this latter defence was not argued at the trial.

For the sake of clarity I think it convenient to discuss the various claims and defences, so far as they are pleaded, and to deal with them *seriatim*.

(a) As to the publishers : (i) The claim for damages for conversion. (ii) The claim for damages for infringement.

(b) As to the printers : (i) The claim for damages for conversion. This claim for reasons which I state later is not raised by the pleadings. (ii) The claim for damages for infringement.

Considering the publishers' case first, the statement of claim in the earlier action of *Ash v. Dickie and Daily Sketch and Sunday Graphic*,

Ltd., alleges that Mr. Dickie is the author of and authorised the publication of **THE DOG**. It continues :

Extracts were published and sold by the *Daily Sketch* during 1932. Mr. Ash claimed an injunction, delivery up and an inquiry to ascertain the damages sustained by the plaintiff by reason both of infringement and conversion.

The defendants denied infringement or conversion. On Oct. 18, 1933, an application was made to LUXMOORE, J., in that action by Mr. Ash asking for an injunction (at that time Mrs. Courtauld had not been joined as a plaintiff). This was refused, but Mr. Buckmaster, for the defendants, undertook to keep until judgment an account of all copies sold or dealt with by him alleged to infringe the plaintiff's copyright. A notice contained in a letter dated Nov. 1, 1933, from Mr. Dickie's solicitors to Hutchinson & Co. is not accurate. It states that it was agreed between the parties that the undertaking should be given—Mr. Shelley denies that he so agreed—and it further states that account should be kept of all copies of the book which may be sold or dealt with by Mr. Dickie and the *Daily Sketch* as appears from the order of the court. Nevertheless, Hutchinson & Co. agreed with Mr. Dickie's solicitors on Nov. 4 to keep an account of all sales as from Oct. 31.

On Feb. 18, 1935, BENNETT, J., gave judgment in the case of *Ash v. Dickie*. He held that there had been actionable infringement, that Mr. Dickie had taken or copied a substantial part of the plaintiff's book and he ordered that there should be an inquiry as to damages by reason of infringement by Mr. Dickie and by reason of the conversion of infringing copies by *Daily Sketch* and *Sunday Graphic, Ltd.* He also granted an injunction against Mr. Dickie. As regards conversion, no judgment was given against Mr. Dickie, and this being a separate cause of action from that of infringement, the one being under the Copyright Act, 1911, s. 7, the other under sect. 6—*Sutherland Publishing Co., Ltd. v. Caxton Publishing Co., Ltd.* (1)—I do not think it can successfully be said, even assuming that Hutchinson & Co. and Mr. Dickie were joint tortfeasors in the alleged conversion, that the plaintiffs in the present case are precluded from proceeding with their action in conversion against the publishers by reason of anything which happened in the *Dickie* action.

But there remains to be considered the effect of the judgment in the *Dickie* case based on infringement. The allegation in that case was, as I have said, that Mr. Dickie had authorised the publication of the book **THE DOG**. Publication means the issue of copies of the work to the public (Copyright Act, 1911, s. 1 (3)), and must be taken, therefore, to be capable of including all necessary steps to that issue, such as printing, and, on the facts of the case, to have included it. Mr. Shelley argued as a general proposition that the authorisation in sect. 1 (2) is a right of the owner, separate from the right to produce, to authorise such reproduction ; and that the invasion of the right to authorise sale

is a separate tort. I cannot take so general a view. The particular nature of the authorisation in each case has to be considered. The word "authorise" in the Act of 1911 includes anyone who sanctions, approves, or countenances—per TOMLIN, J., in *Evans v. Hulton (E.) & Co., Ltd.* (2), *Falcon v. Famous Players Film Co., Ltd.* (3); and applying that interpretation to the facts of this case, in so far as Hutchinson & Co., the publishers, acting for Mr. Dickie, the author, authorised the printer to print *THE DOG*, they, in my opinion, could have been joined as tortfeasors in the *Dickie* action; for the right of the plaintiff to authorise the publishers to publish, and so, impliedly, in their turn, to authorise the printers to print, is one right, and its invasion—through the authorisation of Mr. Dickie and the publishers to print and publish—one wrong. The judgment, therefore, against Mr. Dickie for damages for infringement is a bar to damages against Hutchinson & Co. in this action for what otherwise might be a wrongful infringement. The result is that, by reason of the *Dickie* action, Hutchinson & Co. cannot successfully be sued for infringement but can be sued for conversion, but the only conversion which can be complained of is that pleaded in this action—namely, of wrongful issue of copies to the public in or about Aug., 1933, and at no later date.

As regards conversion by detention, Mr. Shelley admitted that he has not complained of any act of the publishers in conversion other than publishing in or about Aug. 1933, which, therefore, cannot cover a complaint of wrongful detention of books still in the possession of Hutchinson & Co. So much of the conversion as is based on detainee fails.

Finally, therefore, as regards the publishers, the appeal succeeds to this limited extent, that there must be an inquiry into damages for conversion under sect. 7 of the Act of 1911, but such damages for conversion should be limited to copies published and sold in Aug., 1933, and no damages should be given for wrongful detention of copies of *THE DOG* by the publishers. On infringement under sect. 6 of the Act of 1911, the plaintiffs fail against the publishers by reason of the rule in *Brinsmead v. Harrison* (4).

(b) As to the printers: (i) The defence of judgment alleged to have been satisfied by the *Dickie* action. In that action, as I have already stated, the plaintiffs obtained judgment on the basis of infringement only. The question arises whether the plaintiffs could then have sued William Brendon & Son for infringement. The allegation in the statement of claim in *Dickie's* case, that Mr. Dickie authorised the publication, would have enabled the plaintiffs, as I have said, to join the publishers with the author as having authorised, by reproduction, the publication and printing, but the printers are in a different position. They committed one separate tort of printing, apart altogether from the authorisation of

printing by the publishers. The *injuria* which the plaintiffs suffered at their hands is different from the *injuria* at the hands of author and publishers, though the *damnum* might have been the same: see *The Koursk* (5).

There is, therefore, no answer to the claim against the printers for infringement based on the *Dickie* action; for judgment could not have been obtained against them in that action for the same tort as that for which Mr. Dickie and the publishers could have been sued. But the damages in such case will have to be proved in the inquiry. On a claim for infringement damages can be recovered for loss sustained by the infringement based on the profits resulting to the infringers from the piracy, and the question of the consent to sales after Oct. 1933, will have to be considered.

I think that an undated letter of the defendants' solicitors in answer to a letter from the plaintiffs' solicitors in July, 1935, admits that, apart from consent, there was a *prima facie* infringement. The only express allegation of consent in the defendants' pleadings is at the beginning of Oct., 1933, and thereafter. I read the pleadings, however, to make it clear that the earliest consent which can be relied on by the defendants is in Oct., 1933. There thus appears to be an infringement by the printers without consent in August, though of course in the inquiry as to damages caused by the infringement any particular copy of the offending book, *THE DOG*, shown to be published with the consent of the plaintiffs will have to be excluded. In any case, damage due to sales after Aug., 1933, will have to be shown to be the direct result of publication—that is, as the result of the issue to the public in that month.

With regard to conversion by the printers, it is said by the plaintiffs that the printers converted all the copies printed in or about Aug., 1933, by dealing with them in handing them over to the publishers. As I have already indicated, I do not think that the pleadings sufficiently raise this point. They complain of printing, which supports the claim for infringement, but do not, in my view, raise a plea of parting with the printed matter to the publishers so as to found conversion, nor is there any evidence to show that the printers did so tortiously deal with the copies as to constitute conversion. No other allegation of conversion by the printers can be sustained.

My final conclusion, therefore, of this case is, first, that the appeal should be allowed as against the publishers and an inquiry as to damages ordered under sect. 7 of the Act of 1911 for conversion only, such an inquiry being limited to damages directly sustained in Aug., 1933, by sales of, or wrongful dealing with, the matter then published. Secondly, as to the printers, the appeal should be allowed and an inquiry into the damages held with regard only to the infringement by them of the plaintiffs' copyright in Aug., 1933, on the principles on which damages

for infringement may be given under the Copyright Act, 1911, s. 6, the sale of any book not sold without the plaintiffs' consent to be excluded from the inquiry into the damages. In so far as in Aug., 1933, the copyright was vested in Mrs. Courtauld, she and not Mr. Ash is entitled to the inquiry.

The appeal is allowed and the following inquiries directed : (i) An inquiry as to the damages (if any) suffered by the plaintiff Mrs. Courtauld by reason of the infringement of her copyright in *THE PRACTICAL DOG BOOK*, committed by the defendants William Brendon & Son, Ltd., in printing *THE DOG* in the month of Aug., 1933. (ii) An inquiry as to the damages (if any) suffered by the plaintiff Mrs. Courtauld by reason of the conversion by the defendants Hutchinson & Co. (Publishers), Ltd., of copies of *THE DOG* by the issue thereof to the public in the month of Aug., 1933. The defendants must pay two thirds of the plaintiffs' costs of the appeal. The defendants must pay the plaintiffs' costs of the action, save in so far as such costs were increased by the raising of issues other than those on which the plaintiffs have succeeded in this court, the defendants to have the costs occasioned by the raising of such issues with the usual set-off. The costs of the inquiries to be reserved, with liberty to apply in the Chancery Division.

ROMER, L.J. : By the statement of claim in this action the plaintiffs allege that the defendants Hutchinson & Co. (Publishers), Ltd., are the publishers, and the defendants William Brendon & Son, Ltd., are the printers, of a book entitled *THE DOG*, of which one James Dickie is the author. They further allege that such book and all copies thereof are infringements of the plaintiffs' copyright in a literary work entitled *THE PRACTICAL DOG BOOK*, and that the defendants and each of them by such printing and publishing have infringed the said copyright and been guilty of conversion. The date assigned by the statement of claim to these alleged wrongful acts is "in or about Aug., 1933," but Mr. Shelley, on behalf of the plaintiffs, now agrees that the date should be "in Aug., 1933." The defendants Hutchinson & Co., by their defence, admitted that they published *THE DOG* in Aug., 1933, but did not admit that they had infringed the plaintiffs' copyright or been guilty of conversion. In the alternative they alleged, so far as is now material, (i) that the plaintiffs were precluded from obtaining any relief against them by reason of a judgment obtained by the plaintiffs against Mr. Dickie in an action of *Ash v. Dickie* [1933, A. No. 2,388] ; (ii) that as from some date at or about the beginning of Oct., 1933, they continued the publication of *THE DOG* with the full knowledge and consent of Mr. Ash, such plaintiff having been, from Apr., 1932, until June, 1934, the owner in equity, and after June, 1934, the owner in law, of the copyright in *THE PRACTICAL DOG BOOK*. The defendants

William Brendon & Son, in their defence admitted that they were the printers of *THE DOG*, but denied that they had infringed the plaintiffs' copyright or been guilty of conversion. In the alternative they also relied on the judgment in *Ash v. Dickie*, and on the knowledge and consent of Mr. Ash, as from the beginning of Oct., 1933, alleging that in printing the book they were acting as agents for and on the instructions of their co-defendants.

Such were the pleadings themselves at the trial of the action. But before that event took place two letters had been written by the defendants' solicitors to the plaintiffs' solicitors, one being dated July 1, 1935, and one undated but written a few days later. I need not set out the contents of these letters in full. It is sufficient to say that, in my opinion, on their true construction, they contain and were intended to contain an admission by the defendants that the copies of the book *THE DOG*, published and printed by them respectively, were infringements of the plaintiffs' copyright and that they intended to rely solely on the alternative defences to which, so far as is now material, I have just referred.

At the trial of the action neither party adduced oral evidence. The position, therefore, was this: Hutchinson & Co. admitted the publication of infringing copies in the month of Aug., 1933, and it is conceded by them that publication means, among other things, authorising the printing. In the action against Mr. Dickie the statement of claim alleged that he was the author of and had authorised the publication of *THE DOG*, and the judgment against him must have been given in respect of both these wrongful acts. Hutchinson & Co., in authorising Brendon & Son to print must merely have passed on the authority which they had themselves received from Mr. Dickie, for otherwise they were not in a position to "authorise" the printing. The authorising of the printing was therefore due to the concerted act and constituted a joint tort on the part of Mr. Dickie and Hutchinson & Co., and the judgment against Mr. Dickie in respect of that tort precluded the plaintiffs from recovering against Hutchinson & Co. in respect of the same one. But publication also includes the sale and offering for sale of copies to the public, and this would have constituted an infringement of the plaintiffs' copyright if, but only if, the copies had been infringing copies to the knowledge of Hutchinson & Co. (see sect. 2 (2) of the Copyright Act, 1911). Such knowledge, however, was neither alleged nor proved, and no relief could be given to the plaintiffs on this head. But, in view of the provisions of sect. 7 of the Act, any sales in Aug., 1933, were a wrongful conversion of the copies sold, whether Hutchinson & Co. knew or did not know that they were infringing copies. Nor could they avail themselves of either of their alternative defences as affording an answer to the plaintiffs' claim under

this head. For Mr. Dickie had not been sued for conversion, and the alleged knowledge and consent of the plaintiffs only related to a later period than the month of Aug., 1933, which was the only period during which conversion by Hutchinson & Co. was alleged. In these circumstances I am of opinion that the plaintiffs were entitled to recover damages against Hutchinson & Co. for the conversion by sale of infringing copies in Aug., 1933, and that the learned judge should have directed an inquiry to ascertain what such damages were. It is to be observed that conversion by detention was not alleged.

The position of the printers must now be considered. The printing of infringing copies in Aug., 1933, had been admitted by them, and the plaintiffs were accordingly entitled to succeed in the action against them unless they were precluded from doing so by reason of the judgment in the plaintiffs' action against Mr. Dickie. The judgment against Mr. Dickie, as I have already pointed out, must be taken to have been founded in part on the authorising of the printing of *THE DOG*. The present action against Brendon & Son is, on the other hand, in respect of the printing. The tort committed by Mr. Dickie, therefore, was the authorising of the reproduction of *THE PRACTICAL DOG BOOK*, or a substantial part thereof, while the tort committed by Brendon & Son was the reproduction itself. By sect. 1 of the Act the owner of the copyright in a literary work appears to be given (among other things) rights of which one is the sole right of reproducing the work or any substantial part thereof, and another is the sole right of authorising such reproduction. These rights must, I think, be regarded as distinct and separate rights, and the infringement of them as distinct and separate torts. This being so, it is impossible to regard Mr. Dickie or Brendon & Son as joint tortfeasors, and the judgment obtained against Mr. Dickie in no way precluded the plaintiffs from obtaining judgment against Brendon & Son for the tort of printing admittedly committed by them. I am accordingly of opinion that the learned judge should have directed an inquiry to ascertain the damages occasioned to the plaintiffs by the printing of the infringing copies during the month of Aug., 1933. In ascertaining those damages the tribunal conducting the inquiry must have regard to sales of the infringing copies at whatever date such sales may have taken place, because the damage occasioned to the plaintiffs by such sales would flow naturally from the original tort of printing. It will, however, be open to Brendon & Son to show, if they can, that the sales in and after the month of Oct., 1933, were made, or must be deemed to have been made, with the knowledge and consent of the plaintiffs, as alleged in their defence, and the damage occasioned by any such sales will have to be excluded. I am unable to find anything in the statement of claim which would justify any judgment against Brendon & Son in respect of conversion.

For these reasons I am of opinion that the judgment given by FARWELL, J., must be discharged and an order made in the terms which have been stated by SLESSER, L.J.

GREENE, L.J. : At the trial of the action the plaintiffs' counsel elected to close his case without calling evidence, relying on admissions in the defence and on certain correspondence. The defendants' counsel in his turn elected to call no evidence, and he relied on, among other things, the facts relating to a previous action brought by the plaintiffs against one James Dickie and a newspaper company, as disclosed in the pleadings in that action and the correspondence. A plaintiff who relies for the proof of a substantial part of his case on admission in the defence must, in my judgment, show that the matters in question are clearly pleaded and as clearly admitted ; he is not entitled to ask the court to read meanings into his pleadings which, on a fair construction, do not clearly appear, in order to fix the defendants with an admission. Certain of the matters which Mr. Shelley, on behalf of the appellants, argued were admitted on the pleadings cannot, in my judgment, be so treated, and I will first of all eliminate them from the case. They are as follows :

(i) Mr. Shelley claimed that in the statement of claim there was to be found an allegation that the printers had been guilty of conversion. He said that the combined effect of the allegations that the printers printed copies of the offending work and that the publishers published the work (both of which allegations are admitted in the defences) necessarily was that the printers parted with the copies of the work to the publishers and that this amounted to conversion. But it appears to me quite illegitimate to spell out of these allegations any such allegation of conversion, particularly when in the statement of claim the allegation that the defendants were guilty of conversion is based on the performance by them of the acts in the case of the printers of printing and in the case of the publishers of publishing. (ii) Mr. Shelley argued that the allegation that the publishers published the infringing work must be read as including an allegation that they sold copies which to their knowledge infringed the plaintiffs' copyright so as to support a claim under the Copyright Act, 1911, s. 2 (2). The statement of claim cannot, in my opinion, be so construed. (iii) The allegation against the publishers is that they "published" the infringing work "in or about Aug., 1933." Founding himself on the statements in the defence of the publishers, Mr. Shelley claimed that it was admitted by the publishers that they had sold copies subsequently to Aug., 1933, that these sales were acts of conversion and that accordingly the publishers were liable in conversion in respect of all dealings by them with infringing copies whether in or subsequent to Aug., 1933. In my opinion, the only acts

of conversion alleged in the statement of claim against the publishers are acts done in or about Aug., 1933, which I understand Mr. Shelley to agree is to be treated as meaning August, and it is not open to the plaintiffs to extend their claim by reference to admissions in the defence, even if it be proper to construe those admissions as admissions of acts of conversion. (iv) Mr. Shelley also claimed that he was entitled to an order for delivery up of all copies remaining in the defendants' hands. To support such a claim there must, in my opinion, be an allegation in the statement of claim to the effect that there are copies in the hands of the defendants and no such allegation is here to be found. Mr. Shelley endeavoured to get over the difficulty by referring to a paragraph in the defence of the publishers which, he said, impliedly admitted that they still had copies in their hands, and to certain letters from which he claimed that a similar admission could be extracted. In the absence of the appropriate allegation in the pleadings I am of opinion that this claim cannot be supported.

With regard to all these matters no application was made either to the learned judge or to this court for leave to amend the statement of claim, and, in my judgment, the plaintiffs stand bound by their pleadings, and their claims in the action must be limited accordingly.

I now turn to the matters which remain open to the plaintiffs. These are (i) a claim against the printers for infringement; (ii) claims against the publishers for (a) infringement, (b) conversion. I will deal with them in that order.

(i) the claim against the printers is based on the allegation that they were the "printers" of the offending work which was printed "in or about Aug., 1933." This allegation sufficiently states that the printers reproduced the plaintiffs' work or some substantial part thereof in a material form—namely, printed copies. The printers in their defence admit the plaintiffs' copyright and that they printed the offending work. They do not in terms admit or deny that the copies so printed were infringements, but they do not admit that any act of theirs constituted an infringement of copyright. Any doubts as to the meaning of the defence were set at rest by an undated letter from the defendants' solicitors to the plaintiffs' solicitors, in which it is made clear that the defendants admit that all copies of the offending work are infringements. This admission means that the copies were made without the consent of the owner of the copyright, a matter on which the plaintiffs called no evidence, a course which, in view of the admission, they were entitled to take. This being so, the plaintiff Mrs. Constance Cicely Courtauld is, in my opinion, *prima facie*, entitled to damages for infringement of copyright against the printers. The matters in connexion with the former action against Dickie which were relied on as amounting to consent were all subsequent in time to Aug., 1933, and could, in my

judgment, afford no defence to the claim. On the other hand, if and so far as the printers may be able on the inquiry into the damages to show that any sales took place in circumstances which, by reason of consent or otherwise, precluded the raising of any complaint in respect thereof, those sales must be excluded from consideration in estimating the damages flowing from the act of infringement alleged—namely, printing. As it will be open to the defendants on the inquiry to go into the whole matter of such alleged circumstances, I prefer to say nothing on the question whether the material which was placed before the learned judge and this court in relation to them was sufficient to establish consent or not.

But there is another defence raised on behalf of the printers. It is said that judgment was recovered against Mr. Dickie in respect of the infringement committed by him in authorising the publication of the offending work. Mr. Henn Collins, on behalf of the respondents, argued that, on the true construction of the statement of claim in the action against Mr. Dickie, the allegation that Mr. Dickie "authorised the publication" must be read as including an allegation that Mr. Dickie "authorised the publishers to procure or authorise the work to be printed by the printers who in fact printed it." He then says that the real tort lies in the printing, and that Mr. Dickie, the publishers, and the printers were joint tortfeasors in the tort of infringement by printing copies, with the result that the judgment against Mr. Dickie bars any further action against the publishers and the printers or either of them. This argument is not, in my opinion, well founded. Under the Copyright Act, 1911, s. 1 (2), the rights of the owner of copyright are set out. A number of acts are specified, the sole right to do which is conferred on the owner of the copyright. The right to do each of these acts is, in my judgment, a separate statutory right, and anyone who without the consent of the owner of the copyright does any of these acts commits a tort; if he does two of them, he commits two torts, and so on. Now at the end of the list of acts there is added the words (which must be prefaced by the words "the sole right"): "To authorise any such acts as aforesaid." The statute in terms treats the right to authorise as a separate right, different from the other rights specifically enumerated. It is not, in my humble judgment, correct to say that the words "to authorise any such acts as aforesaid" are mere surplusage. A person may no doubt reproduce a work himself or through an agent, and the word "reproduce" would cover such a case. But he cannot, I think, be said to reproduce a work if he has merely authorised someone else to reproduce it. Similarly, in the case of a dramatic work, an author may be said to "perform" his work if he engages the company of actors who perform it; if he merely licensed a performance he could not be said to perform the work. These considerations made it essential that the legislature should confer the

right to authorise as a separate and substantive right, and they are of particular importance when it is remembered that infringement is defined not by an independent catalogue of acts which are to amount to infringement but by reference to the rights conferred on the owner of the copyright. The view that authorisation is a different tort to the reproduction authorised is I think supported by the decisions in *Evans v. Hulton (E.) & Co., Ltd.* (2) ; and *Falcon v. Famous Players Film Co., Ltd.* (3). In my opinion, therefore, the judgment in the *Dickie* action is no defence to the present action against the printers.

(ii) (a) The case on infringement against the publishers is to be found in the allegation that they published the offending work in or about Aug., 1933. I have already pointed out that the statement of claim does not cover a claim under sect. 2 (2). On the other hand, it is conceded by Mr. Henn Collins that the word "publish" in the context includes authorising or procuring the printing—indeed he could not well have declined to make this concession since it was necessary for him to place a similar meaning on the word "publication" in the statement of claim in the *Dickie* action in order to found his argument relating to joint tortfeasors. Accepting, therefore, this construction of the word "publish," I find an allegation admitted in the defence that the publishers procured or authorised the printing in or about Aug., 1933, while the undated letter referred to above contains an admission that all copies of the work were infringing copies. If the matter stood there, there would be sufficient to entitle Mrs. Courtauld to an inquiry into the damages against the publishers on the infringement claim, subject to this, that on the inquiry the publishers, like the printers, would be at liberty to prove, if they could, facts relating to sales during any particular period which would preclude the raising of any complaint with regard to those sales.

My reasons for thinking that the judgment in the *Dickie* action is no bar to the claim against the printers apply equally in the case of the publishers to the argument that the only tort committed was that of "reproduction" and that Mr. Dickie and the publishers were joint tortfeasors therein. But in the case of the publishers there is a further argument based on the rule as to joint tortfeasors, and it is this. In the *Dickie* action the allegation against Mr. Dickie was that he authorised publication which must, I think, include the allegation that he authorised the publishers to authorise or procure the printers to print. In this action the allegation is that the publishers procured or authorised the printers to print, and it is said that there was one authorisation to print in which Mr. Dickie and the publishers were jointly concerned, with the result that the judgment in the *Dickie* action is a bar to this action against the publishers so far as it is based on infringement. In my judgment, this argument succeeds. The distinction is no doubt a narrow one, but I think that it is nevertheless sound. When the publishers

authorised the printers to print they were merely acting under the authority to that end already given to them by Mr. Dickie—the authorisation by them was a derivative, not an original, authorisation, and I cannot find any independent tort of authorisation committed by them. The action against the publishers, therefore, so far as it is based on infringement, in my judgment, fails.

(ii) (b) There remains the claim in conversion against the publishers. The allegation that they “published” includes, I think, an allegation that they issued to the public. As I have already pointed out, it is admitted that all copies were infringing copies. The conversion alleged is in or about Aug., 1933, so that any consent based on what took place in connection with the *Dickie* action is irrelevant. Lastly, no judgment in conversion was obtained against Mr. Dickie so that the rule relating to joint tortfeasors does not apply. Mrs. Courtauld is therefore, in my opinion, entitled to an inquiry into the damages suffered by her through the conversion alleged—namely, issue of copies to the public in Aug., 1933, but is not entitled to any damages in respect of acts of conversion committed after that time.

It will be observed that I have limited the claims for damages to those suffered by Mrs. Courtauld. The reason for this is that the infringement by the printers and the conversion by the publishers in respect of which inquiries are ordered both took place in Aug., 1933, at a time when the copyright was vested in Mrs. Courtauld.

I agree with the order proposed by SLESSER, L.J.

Solicitors: *Paisner & Co.* (for the appellants); *Birkbeck, Julius, Edwards & Co.* (for the respondents).

[Reported by T. A. DILLON, ESQ., Barrister-at-Law.]

MARCHANT *v.* FORD AND OTHERS.

[COURT OF APPEAL (Greer, Slessor and Scott, L.J.J.), July 27, 28, 1936.]

Practice—Pleading—Striking out part of claim—No cause of action—Libel—Claim against printer of advertising wrapper of book containing all eged libel—Assisting to publish—R.S.C., Ord. 25, r. 4.

The plaintiff sued for libel the author, printers and publishers of a novel, and also the printers of the advertising wrapper, which contained a striking picture and a reference to the contents of the book, though no directly defamatory matter. Against these defendants he pleaded that they had "assisted to publish" the libels in the book. The judge in chambers ordered this part of the statement of claim to be struck out and the plaintiff appealed:—

HELD: (i) an allegation of assisting in publication is identical with an allegation of publication.

(ii) the question of whether these defendants were a party to the publication was one of fact to be decided on the evidence at the hearing and the claim in respect thereof should not have been struck out.

[EDITORIAL NOTE.] In framing a claim for "assisting the publication" of a libel, the plaintiff has pursued, perhaps, what is an original course. The court took the view that when all the facts were proved there might be found to be a perfectly good claim in law and it was not a case where this part of the claim should be struck out as showing no cause of action.

AS TO STRIKING OUT CLAIMS SHOWING NO CAUSE OF ACTION, see HALSBURY, 1st Edn., Vol. 22, Pleading, pp. 435, 436, para. 879; and FOR CASES, see DIGEST, Pleading, pp. 73–82, Nos. 634–687. FOR R.S.C. Ord. 25, r. 4, see YEARLY SUPREME COURT PRACTICE, 1936, pp. 393–396.]

Cases referred to:

- (1) *Kelly's Directories, Ltd. v. Gavin & Lloyds*, [1902] 1 Ch. 631; 13 Digest 218, 547.
- (2) *Emmens v. Pottle* (1885), 16 Q.B.D. 354; 32 Digest 81, 1120.
- (3) *Vizetelly v. Mudie's Select Library, Ltd.*, [1900] 2 Q.B. 170; 32 Digest 82, 1122.
- (4) *Hubbuck & Sons, Ltd. v. Wilkinson, Heywood & Clark, Ltd.*, [1899] 1 Q.B. 86; Digest Pleading 72, 626.
- (5) *Dyson v. A.-G.*, [1911] 1 K.B. 410; Digest Pleading 75, 645.

APPEAL from an order made by GREAVES-LORD, J., at chambers on July 14, 1936, reversing a decision of the learned master and ordering the plaintiff's statement of claim against two of the defendants to be struck out.

The defendant Ford wrote a book entitled "Anna Craft," the plot of which was that the heroine, being the mistress of one man, became the mistress of another and underwent an illegal operation. Her father was drawn throughout the book as a vulgar, brutal and unsympathetic character. The plaintiff considered that these characters were recognisable as portraits of himself and his daughter; he brought an action against the author, the printers and the publishers, and also against the printers of the illustrated advertising wrapper in which the book was sold—the defendant firm McLagan and Cumming. Against

these last-named defendants the plaintiff alleged that they "by printing the said wrapper assisted falsely and maliciously to publish of the plaintiff" the passages in the book which he alleged to be libellous. The wrapper bore a picture of the heroine, wearing less than the usual allowance of clothes, in conversation with her second lover, and these words: "Anna Craft is no fancy title, but the name of a surprising personality, who forms the background for Richard Ford's first novel." He claimed damages, an injunction to restrain from publishing, and an order for delivery up of the book and wrapper and the destruction of all blocks and type.

The defendants McLagan and Cumming admitted printing the wrapper but denied all the other allegations. They applied to the master for an order that the plaintiff's statement of claim, so far as it referred to them, be struck out under R.S.C., Ord. 25, r. 4 or otherwise, on the grounds that it disclosed no reasonable cause of action and was frivolous and vexatious; also that the plaintiff's action against them be stayed or dismissed; alternatively, that the point of law raised by the allegation that they printed the said wrapper and thereby assisted falsely and maliciously to publish the alleged libel be set down for hearing and disposed of before the trial of the issues of fact: R.S.C., Ord. 25, r. 2. The master made no order except to award the costs of the application to the plaintiff. On an appeal to GREAVES-LORD, J., at chambers on July 14, 1936, the learned judge ordered that the appeal be allowed, that so much of the plaintiff's statement of claim as referred to the defendants McLagan and Cumming be struck out, that the plaintiff's action against these defendants be stayed, and that these defendants be at liberty to sign judgment for their costs of defence, including the costs of the appeal and the application to the master.

The plaintiffs appealed.

Theobald Mathew for the plaintiff: The cover by its form invited the public to purchase the book, which contained matter defamatory to the plaintiff. The fact that the plaintiff was not libelled on the cover is irrelevant, because the cover assisted in the publication of the libel contained in the book.

Harold Murphy, K.C., and the *Hon. Ewen E. S. Montagu* for the defendants McLagan and Cumming: There is no precedent for the plea of "assisting to publish." If assisting amounts to causing, it can be so pleaded, but if it does not, it cannot found a civil action in libel. These defendants have not published libellous matter; there is here nothing more than a little added advertisement for the book itself. If this is actionable, an action would lie against any reviewer who published a favourable notice of the book, or against the designer or manufacturer of the cover. "Assisting" may be a criminal offence where knowledge and intent are material, but it is not a ground for a civil action. In

Kelly's Directories, Ltd. v. Gavin & Lloyds (1) the defendants printed the first part of the book but not the remainder; the book infringed the plaintiff's copyright but not in the part printed by the defendants; it was held that the defendants had not published so as to make themselves liable for the breach of copyright. In that case there was much stronger evidence of publication than in the present case, for there the defendants printed their names on the title page of the book and actually printed a portion of it. These defendants have never been disseminators of the alleged libel in the sense of *Emmens v. Pottle* (2) and *Vizetelly v. Mudie's Select Library* (3). On the cover there was no reference to the plaintiff or to any offending passage.

GREER, L.J. : There is a reference to the whole book.

SLESSER, L.J. : In *Hubbuck & Sons, Ltd. v. Wilkinson* (4), SIR N. LINDLEY, M.R., said at p. 91 :

The . . . summary procedure [in rule 4] is only appropriate to cases which are plain and obvious, so that any master or judge can say at once that the statement of claim as it stands is insufficient, even if proved, to entitle the plaintiff to what he asks.

Dyson v. Attorney-General (5) is to the same effect.

GREER, L.J. : I may as well say that the three members of the court have made up their minds that this is not a point which ought to be decided on a summons in chambers under rule 4, and the appeal must succeed. We have given Mr. Mathew liberty to amend his claim by putting his statement of claim against these defendants in the more familiar form which has been used in most of the cases, but in my judgment no amendment is necessary. The allegation of assisting in the publication is exactly the same as an allegation of publication. I am not going to decide what will ultimately have to be decided at the trial—namely, whether or not the words which my Lord, misusing the English language as it is misused in the newspapers, has called “ blurb,” were an invitation to readers to read the book which would justify the conclusion, at any rate *prima facie*, that the printer of what is inside the cover is a party to the publication of the work to the public. That will be a matter proper for argument when the case comes on for trial. All we have to decide in this case is whether use can be made of the rules with regard to the striking out of a statement of claim to determine in advance an arguable question which is partly one of law and partly one of fact. It seems to me that the learned judge took upon himself to decide a matter which could only properly be decided when the whole evidence was put before the court. It is quite conceivable that the plaintiff may succeed, by interrogatories or otherwise, in giving some evidence that the printers of the cover and of the invitation on the inside of the cover knew something about what was inside it. On the other hand,

he may be able to succeed even though he is unable to prove that. That is a matter which cannot be decided in advance of the evidence in the case. For those reasons, without forming any final conclusion as to what ought to be done at the trial, we think that the learned judge was wrong in deciding this as a preliminary point under the rules which govern the striking out of a statement of claim. Demurrers have been abolished, and the only substitute for a demurrer under the Judicature Act and rules is to take out a summons for the determination of a preliminary question, either of law or of fact. When that is done, evidence can be adduced on both sides to enable the court to decide that preliminary question. On a summons in chambers, however, there is no opportunity of adducing the necessary evidence in a satisfactory way. I therefore think that the learned judge was wrong and that this appeal should be allowed—with an intimation, at any rate in an alternative way, that Mr. Mathew ought to be at liberty to amend his statement of claim as to publication in the usual manner. For those reasons I think that this appeal should be allowed, with costs both here and below.

SLESSER, L.J. : I agree.

SCOTT, L.J. : I agree. I should just like to add one word, and that is that R.S.C., Ord. 25, r. 2 enables a demurrer in the old sense of the term, for practical purposes, to be raised on a question of law. That rule is, however, wholly inappropriate to a case of this kind.
Appeal allowed with costs.

Solicitors : *Theodore Goddard & Co.* (for the plaintiff) ; *Oswald Hickson, Collier & Co.* (for the defendants, McLagan and Cumming).

[*Reported by* DEREK H. KITCHIN, ESQ., *Barrister-at-Law.*]

R. v. HUTCHISON AND OTHERS, *Ex parte* McMAHON.

[KING'S BENCH DIVISION (Swift, Humphreys and Goddard, JJ.), July 29, 1936.]

Contempt of court—Pending proceedings—Cinema films—Caption.

During a procession in London, in which the King was riding, a revolver fell close to His Majesty's horse. It appeared that it was either thrown by or knocked out of the hand of a man who was subsequently charged with being in unlawful possession of firearms. A news film of the man's arrest was shown with the caption "Attempt on the King's life" :—

HELD : the caption was liable to prejudice the accused's fair trial and was a contempt of court.

[EDITORIAL NOTE.] Cases of this nature are common enough with regard to newspapers and their extension to news films would seem to follow as a matter of course.

FOR THE LAW ON THE POINT, see HALSBURY, Hailsham Edn., Vol. 7, pp. 9, 10, para. 12; and FOR CASES, see DIGEST, Vol. 16, pp. 22, 23, Nos. 169–183.]

APPLICATION to make absolute a rule *nisi*, obtained on behalf of George Andrew McMahon, directed to the Gaumont British Distributors, Ltd., to show cause why they should not be attached for contempt of court, by reason of their having distributed a film showing the arrest of the applicant, to which film a caption, consisting of the words "Attempt on the King's life," had been attached, the showing of such film being calculated to prejudice the trial of the applicant.

A similar rule was obtained against Mr. Hutchison, the manager of the Hendon Central Cinema and the Hendon Central Cinema, Ltd., in respect of the exhibition of the film. It appeared that the distributors had posted a letter to the cinema proprietors asking them to delete the caption, but the letter miscarried in the post. Revised posters, however, which had been sent were exhibited in place of those originally sent out with the film. The facts were that a revolver, loaded in some of its chambers, fell near the King's horse as he was riding in procession down Constitution Hill, London. There was some doubt as to whether the accused threw the revolver or whether it was knocked out of his hand by some other person. The news film showed nothing of the incident itself, but only the arrest of the accused.

F. van den Berg, K.C., and *Harold Lightman* for the Gaumont British Distributors, Ltd.

G. H. Beyfus, K.C., and *H. C. Marks* for Mr. Hutchison and the Hendon Central Cinema.

Counsel showing cause against the rule expressed their clients' profound regret and sincere apology, and referred to the feeling that the incident had aroused and the miscarriage of the letter requiring the deletion of the caption.

St. John Hutchinson, K.C., and *Frank Milton (J. C. Maude with them)*

in support of the rule : The matter is a serious one. McMahon was charged with being in unlawful possession of firearms. The cinemas put upon their captions that the accused had made an attempt upon the King's life. This was broadcast to 263 cinemas. The picture merely showed the man's arrest with the crowd around him. It did not show in any form at all any action taken by the man until he had been arrested. Therefore the heading was wildly misleading. On July 16 the man's solicitor had said that he never intended to injure the King, but on July 17, 18, 19 and 20 the film was shown. The words would be seen by people who might be jurors at the trial. The man had not yet been committed.

The judgment of the court was delivered by SWIFT, J.

SWIFT, J. : After what has been said by counsel for the respondents, it is not necessary to say anything about this case except to call to the attention of the proprietors of film houses and of the exhibitors of films, the fact that they are in no different position than anybody else. Their conduct will be scrutinised by the court like anybody else's if they are brought before the court. The film is no more immune from the rules regarding contempt of court, than the newspaper is. Proprietors of cinemas and distributors of films must realise that, if they want to produce these sensational films, they must take care in describing them not to use any language likely to bring about any derangement in the carriage of justice. Now, having regard to the facts of this particular case, the court takes the view that Mr. Hutchison and the Hendon Central Cinema, Ltd., may be dealt with, after the warning which the court has given to them, very leniently. The court accepts the apology as a sincere apology, and it will be accepted, and no more will be required from them than that they should pay the costs of the application against them.

So far as regards Gaumont British Distributors, Ltd., the case is more serious. They distributed these films, on which was this caption, and also these posters, not only to Mr. Hutchison and his cinema, but to 262 others in the country. It is in their favour that they withdrew them as soon as their attention was called to the matter, and they, too, have made a very full and, the court believes, a sincere apology. However, to mark the court's disapproval of their conduct they will be fined a sum of £50, and costs.

Solicitors : *A. Kerstein & Co.* (for the applicant) ; *M. A. Jacobs & Sons* (for the respondents).

[*Reported by W. K. SCRIVENER, ESQ., Barrister-at-Law.*]

HERD v. HERD (KING'S PROCTOR INTERVENING).

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Bucknill, J.), July 6, 17, 1936.]

Divorce—Domicil—Desertion by husband—Foreign domicil acquired by husband—Petition for divorce by wife in England—Jurisdiction of court to grant decree.

A husband and wife, both born in England of English parents, were married in England in 1905, where they resided together until in 1923 the husband left his wife and went to the United States of America. The husband corresponded regularly with his wife and sent her money until 1932, when she discovered that he was living with another woman as his wife. In reply to an inquiry the husband wrote that he had no thought of returning to England. The wife petitioned for divorce in England, alleging that she and her husband were domiciled in England. The husband did not enter an appearance. At the adjourned hearing, when the King's Proctor had entered an appearance in the suit to argue the question of domicil and of the court's jurisdiction to grant a decree of divorce, a certificate from the U.S. Department of Labour was put in, to the effect that the husband was naturalised in New York in 1930. By the law in the United States of America, the husband in order to have obtained such a certificate must have declared on oath at least two years before his admission as a citizen of the United States that it was *bona fide* his intention to become a citizen and to renounce for ever allegiance to the state of which he might at the time be a citizen. He must also have stated in writing his intention to reside permanently within the United States:—

HELD: (i) at the time when the petition was filed, the husband was domiciled in the United States of America, and had lost his domicil in England;

(ii) there was no jurisdiction in the court in England to grant a decree of divorce.

[EDITORIAL NOTE.] The suggestion of a matrimonial domicil seemed at one time to be regarded with some favour by legal authorities in this country, and in HALSBURY, 1st Edn., Vol. 6, p. 263, it is suggested that in the circumstances of this case “(probably) the English courts may decree a divorce in favour of a wife.” Since that was written in the early part of 1909, opinion has hardened against the idea; and it is now clear beyond question that, as the law stands at present, the law of domicil in all matters of divorce is precisely the same as in all other matters. The deserted wife whose husband has acquired a new domicil must therefore seek a divorce within the jurisdiction of the husband's new domicil.

FOR THE LAW ON THE POINT, see HALSBURY, Hailsham Edn., Vol. 6, pp. 296-300, para. 353; and FOR CASES, see DIGEST, Vol. 11, pp. 421-427, Nos. 874-920.]

Cases referred to:

- (1) *Bell v. Kennedy* (1868), L.R. 1 Sc. & Div. 307; 11 Digest 312, 36.
- (2) *Winans v. A.-G.*, [1904] A.C. 287; 11 Digest 312, 38.
- (3) *H. v. H.*, [1928] P. 206; Digest Supp.
- (4) *Ogden v. Ogden*, [1908] P. 46; 11 Digest 334, 228.
- (5) *Lord Advocate v. Jaffrey*, [1921] 1 A.C. 146; 11 Digest 333, 221.
- (6) *Le Mesurier v. Le Mesurier*, [1895] A.C. 517; 11 Digest 422, 885.
- (7) *A.-G. for Alberta v. Cook*, [1926] A.C. 444; Digest Supp.
- (8) *Hyman v. Hyman*, [1929] P. 1; [1929] A.C. 601; Digest Supp.

PETITION by a wife for dissolution of her marriage on the ground of her husband's adultery from 1925 onwards in the United States of America. The petition alleged that the petitioner and the respondent were domiciled in England. The husband did not enter an appearance. The facts giving rise to the intervention of the King's Proctor and to the argument of the question of the domicile of the husband and the wife and of the jurisdiction of the court to grant a decree of divorce are fully set out in the judgment.

Richard Ellis for the petitioner.

The Solicitor-General (Sir Terence O'Connor, K.C.) and *Theodore Turner* for the King's Proctor.

BUCKNILL, J. : The point for decision in this case is whether in the circumstances this court has jurisdiction to pronounce a decree of dissolution of marriage.

The wife filed a petition on Nov. 23, 1934, for the dissolution of her marriage on the ground of her husband's adultery from 1925 onwards in the United States of America. The petition alleged that the petitioner and the respondent were domiciled in England. The respondent was served with the petition and did not enter an appearance. When the case came on for hearing in the undefended list, the petitioner proved that she was married in England in 1905 and that she and her husband were born in England of English parents. After the marriage they lived in England and there was one child of the marriage. In 1923 the husband left his wife and went to the United States. He corresponded fairly regularly with his wife and sent her money until 1932. The wife then found out that the husband was living with another woman as his wife. The petitioner then wrote to her husband a letter in which she said : " Would you let me know if you have decided to remain in America, or whether you intend to come to England eventually. I am told I must know this, as my nationality is the same as yours." The husband replied to this letter : " You ask, do I intend to remain in America altogether ? Yes, I have no thought of returning to the old country." The petitioner's solicitors then wrote to the respondent saying :

We have ascertained that you are cohabiting with another woman who is described as your wife, and our client has been advised to take proceedings for divorce. If, as she understands, you have abandoned your English domicile and have renounced any intention of ultimately returning to England, our client's proper course would appear to be to travel to the U.S.A. and sue there for divorce. If, on the other hand you have not abandoned your English domicile and propose ultimately to return to this country, her course of action will be different and she will take steps to obtain a decree in this country. Our object in writing is to ascertain, regardless of the course which your answer will involve, in what country you are now domiciled and we shall be glad to have your answer as soon as possible,

To this letter the respondent replied: "I have no present intention of returning to Great Britain."

At the hearing it was proved that the respondent, who is a plumber, was living and had been living in the United States for many years with another woman as his wife. Having regard to the statements by the respondent in the letters to which I have referred, and which counsel for the petitioner very properly drew to the attention of the court, I adjourned the hearing and directed the papers to be sent to the King's Proctor in order that the question of the domicile of the husband and his wife and of the jurisdiction of the court to grant a decree of divorce might be fully argued, if the Attorney-General might so direct. The King's Proctor then entered an appearance in the suit, and at the adjourned hearing the Solicitor-General appeared on his behalf, and with the consent of counsel for the petitioner put in a certificate from the United States Department of Labour to the effect that the respondent was naturalised by the United States District Court at New York on Dec. 22, 1930. Proof was also given before me by an expert in the law of the United States that the respondent in order to obtain such a certificate must have declared on oath two years at least before his admission as a citizen of the United States that it was *bona fide* his intention to become a citizen of the United States and to renounce for ever all allegiance and fidelity to the state of which he might be at the time a citizen. Not less than two years after he has made such a declaration of intention he must also state in writing that it his intention to reside permanently within the United States. The Solicitor-General, by consent of counsel for the petitioner, also read a statement by H.M. Consul-General at New York to the effect that he had interviewed the respondent, and the respondent had then stated that he had been living with another woman as his wife since 1919, that he landed at New York on Apr. 6, 1923, at once applied for and received his first papers declaring his intention to become a United States citizen, that the woman in question shortly afterwards arrived in New York, and that he and she had since regularly cohabited there, that he completed his naturalisation as a United States citizen during 1928, and that he had no intention of leaving the country which he had adopted as his permanent home.

Mr. Ellis, for the petitioner, argued that these facts did not establish that the respondent had acquired a domicile of choice in the State of New York. He argued that the respondent had been obliged by American law to become a naturalised citizen there if he wished to stay in the country for any considerable period of time, and that the fact that he had been naturalised did not prove that he intended to make the United States his permanent home. Mr. Ellis also argued that the respondent in his letter to the petitioner's solicitors, to which I have already referred, only said that he had no present intention of returning to Great Britain.

He also relied on the fact that the respondent had not appeared to the petition and had not objected to the jurisdiction of the court on the ground that he was not domiciled in England.

The intention of a man to acquire a domicile of choice is a matter of fact, and the burden of proof is on him who asserts such intention. In this case there must be satisfactory evidence of a fixed and settled purpose on the part of the respondent to abandon England as his domicile and of a determination on his part to make his home in the United States and also that he had made it his home :

With the intention of establishing himself and his family there, and ending his days in that country,

to use the words of LORD CAIRNS, L.C., in *Bell v. Kennedy* (1), at p. 311, and quoted by LORD MACNAGHTEN in *Winans v. Attorney-General* (2).

On the other hand the Solicitor-General argued that the facts in this case clearly established that the respondent had acquired a domicile of choice in the United States. In my judgment the contention of the Solicitor-General is right. Not only has the respondent solemnly stated that his intention is to reside permanently in the United States, but it seems to me that he has done everything that a man in his circumstances reasonably can do to prove his intention. I therefore hold that at the time when the petition was filed in these proceedings the respondent was domiciled in the United States, and had lost his domicile of origin in England.

On that finding of fact the general rule of law applicable to the point at issue is stated by LORD MERRIVALE, P., in *H. v. H.* (3), at p. 212 thus :

Under British law the jurisdiction to decree divorce depends on domicile ; that the domicile of the husband determines the domicile of the wife ; and that independent authority to decree divorce cannot, consistently with English law, co-exist at the same time in two sovereign states.

Mr. Ellis, who argued the case so ably on behalf of the petitioner, argued that although this is the general rule of law the rule does not apply where the husband having his domicile of origin in England, has married his wife in England, and has deserted her in England, and has gone abroad, and in divorce proceedings by the wife has not himself appeared and objected to the jurisdiction on the ground that he is no longer domiciled in this country. There is no precise authority on this point, but it appears from the remarks of SIR GORELL BARNES, P., when pronouncing the judgment of the Court of Appeal in *Ogden v. Ogden* (4), that in undefended cases for dissolution of marriage, there was at one time a practice in the Divorce Court of granting a decree of divorce, although the domicile of the husband in this country was not established. In that case SIR GORELL BARNES, P., said, at p. 78 :

In cases where a wife has been deserted in the country of the domicile by her

husband in circumstances entitling her to sue for divorce, it has been held that she might sue in the courts of the country of the domicile notwithstanding the fact that the husband has left the country and might possibly have done so with the intention of acquiring a domicile in another country. The decree in such a case is justified, either by considering that the husband cannot be heard to say that he has changed his domicile, or, as some have thought, that the wife must *ex necessitate* be entitled to treat the country of the previous matrimonial domicile as still being the country of her domicile, and to require its courts to do justice to her, because otherwise it would be impossible for a wife so situated to obtain a decree, as the respondent might keep changing his abode from place to place, asserting that he had abandoned his original domicile, and any domicile with which it were sought to fix him.

No reported case was brought to my notice in which the Divorce Court has decreed the dissolution of a marriage in a case in which the husband was domiciled abroad at the time when the petition was filed. In *Ogden v. Ogden* (4) the point for the decision of the court was whether a marriage in England between an English woman and a French man was in fact a valid marriage. Having regard to the expressions of SIR GORELL BARNES, P., in *Ogden v. Ogden* (4) to which I have referred, and to the absence of any precise authority, I have looked at the majority report of the Royal Commission on Divorce, which was signed by SIR GORELL BARNES, P., as chairman four years after the decision in *Ogden v. Ogden* (4) in Nov., 1912, to see whether it contains any reference to the practice referred to in *Ogden v. Ogden* (4). Paras. 343 and 344 of this report state :

As the wife's domicile is according to our law that of her husband, it follows that in strictness if he deserts her, and proceeds abroad with the intention of acquiring a new domicile, he can defeat her case unless some provision be made to protect her. Most, if not all of the cases of this kind have been undefended cases, and the difficulty has been got over by adopting the view, in order that justice may be done, either that the husband cannot be heard to say that he has changed his domicile, or perhaps that the wife may be treated as having by her husband's act acquired a domicile of her own—[I think it must be "having by the desertion of her husband acquired a domicile of her own"]—the question has never been raised in a contested case.

Since the judgment in *Ogden v. Ogden* (4), however, three cases have been decided, one in the Privy Council, one in the House of Lords and one in the Divorce Court, which appear to preclude me from following the practice which had the approval of the Court of Appeal in *Ogden v. Ogden* (4), of assuming jurisdiction in a case such as the present. The first suggestion made in the judgment in *Ogden v. Ogden* (4) that in certain circumstances the wife must be entitled to treat the country of the previous matrimonial domicile as still being the country of her domicile, is inconsistent with the speech of VISCOUNT HALDANE in *Lord Advocate v. Jaffrey* (5), at p. 152, where he said :

Since *Le Mesurier v. Le Mesurier* (6) was decided . . . it has been clear that

nothing short of a full juridical domicile within its jurisdiction can justify a British court in pronouncing a decree of divorce, and that the old notion is now obsolete, that there can be, short of such a full domicile, a so-called "matrimonial domicile" which can give the same result. I think that it is implied as a consequence not less plain, that there can be only one real domicile. Not only is there no authority for the proposition that under the laws of these islands husband and wife can have, while they continue married, distinct domicils, but if it were otherwise the consequences in such circumstances as those before us would be extraordinary. Proceedings for dissolving the status of marriage might be carried through in two jurisdictions, possibly with different results.

In the case of *A.-G. for Alberta v. Cook* (7), a petition for divorce was dismissed on the ground that the court had no jurisdiction, because the husband respondent was not domiciled within the jurisdiction of the court. The petition was undefended, and the husband did not appear. LORD MERRIVALE, P., in that case pronounced the judgment of the Board and said at p. 465 :

In so far as British tribunals are concerned it is a requisite of the jurisdiction to dissolve marriage that the defendant in the suit shall be domiciled within the jurisdiction.

The other suggestion made in the judgment in *Ogden v. Ogden* (4) that the husband cannot be heard to say that he has changed his domicile in such a case as this, has been repudiated in the judgment of LORD MERRIVALE, P., in *H. v. H.* (3). In that case the husband and wife were married in England in 1915. Six years later, in 1921, a decree of judicial separation was pronounced at the instance of the wife. In 1928 the wife petitioned for a dissolution of the marriage on the ground of her husband's alleged adultery in France in 1927 and 1928. The husband appeared under protest, alleging that he had not an English domicile and that he had been domiciled in France since 1923. The actual point for decision in the case was whether the husband's appearance under protest should be disallowed—in other words whether his plea was good in law, even if the facts established the change of domicile. It was argued on behalf of the wife that the husband in the circumstances was estopped from asserting a change of domicile. LORD MERRIVALE, P., held that in that particular case the husband was not estopped from setting up a domicile of choice abroad acquired after a decree of judicial separation had been made against him in this country. In the course of his judgment LORD MERRIVALE, P., said, at p. 214 :

An issue of domicile, therefore, is not to be prejudged so as to give effect to a presumption of law, but is to be duly tried to determine the relevant matters of fact. . . . Upon the trial the court will determine whether the respondent has taken up his residence in France and is in truth resident there with that intention which combined with residence results in a change of domicile.

It was argued before me on behalf of the petitioner that the case now under consideration differed from *H. v. H.* (3), because in this case the

respondent has not appeared to protest against the jurisdiction or to allege that he has acquired a domicile of choice and that he has abandoned his domicile of origin. I was also asked to assume that the courts of the United States would probably recognise as valid a decree of divorce if made in this case, although the husband is domiciled there and to grant a decree upon that assumption. I do not think that I ought to deal with the case in this way. My duty as prescribed by the Supreme Court of Judicature (Consolidation) Act, 1925, s. 178 (1), is to satisfy myself as to the facts alleged in the petition. One of the facts alleged therein is that the husband and wife were domiciled in this country when the petition was filed. As SCRUTTON, L.J., remarked in *Hyman v. Hyman* (8), at p. 30 :

The [Divorce] Court does not, as other courts do, act on mere consents or defaults of pleading, or mere admissions by the parties.

In this case I have to regard the facts as they were proved to me. I have also to consider the submission of the Solicitor-General on behalf of the King's Proctor that in this case the court has no jurisdiction. If the facts establish, as in my judgment they clearly establish, that the respondent acquired a domicile of choice in the United States before the petitioner filed her petition, then I must apply the rule of law laid down in the House of Lords and in the Privy Council that the court has no jurisdiction in such a case to make a decree of dissolution of the marriage.

The result will be that the petition will be dismissed.

Solicitors: *Attwater & Liell* (for the petitioner); *Treasury Solicitor* (for the King's Proctor).

[Reported by J. F. COMPTON MILLER, ESQ., *Barrister-at-Law*.]

F. W. WOOLWORTH & CO., LTD. v. LAMBERT.

[COURT OF APPEAL (Lord Wright, M.R., Romer and Greene, L.JJ.),
July 27, 28, 29, 1936.]

Landlord and Tenant—Improvements—"Without licence or consent"—Unreasonable withholding—Demand of sum of money considered excessive by lessees—Counter-offer of lesser sum as compensation—Power of court to order reference to official or special referee—Improvements from tenants' point of view—Demised premises as part of composite premises—Landlord and Tenant Act, 1927 (c. 36), s. 19 (2), (3).

In a lease in which the respondents were the lessors and the appellants were the lessees, the appellants covenanted, *inter alia*, that they would not make any structural alterations on the demised premises without the previous consent in writing of the landlords, and would not commit, or permit to be committed, waste, and that they would use and occupy the demised premises as a first-class shop. The appellants acquired a lease of a piece of land behind the demised premises, and desiring to erect one large shop over the whole property, they proposed pulling down the back wall of the shop on the demised premises, moving the main staircase, lavatories and ventilating apparatus, and making other structural alterations. The respondents would only grant their consent upon payment by the appellants of the sum of £7,000. The appellants regarded this sum as unreasonable and offered instead: (a) a covenant to reinstate the premises at the expiration of the lease; (b) an insurance with an insurance company to be approved by the respondents to secure the fulfilment of such covenant; and (c) payment of a sum equalling any diminution in value of the demised premises, "whatever sum a court thinks reasonable and proper to be paid." Upon the respondents refusing to agree to these terms, the appellants sought a declaration under the Landlord and Tenant Act, 1927, s. 19 (2), that the respondents were unreasonably withholding their consent and that the appellants were entitled to make the proposed alterations without further request for consent or licence subject to: (a) an undertaking to reinstate the demised premises at the expiration or sooner determination of the term in the condition in which the premises now are; (b) securing the performance of this undertaking by a policy of insurance; and (c) paying to the respondents such sum (if any) as the court shall deem to be reasonable:—

HELD: (i) the onus of proving that the licence or consent was unreasonably withheld was upon the appellants, and as there was insufficient evidence to show whether the sum demanded, viz., £7,000, was reasonable or unreasonable, the court could not hold that the consent was being unreasonably withheld.

(ii) the appellants having adduced evidence at the trial that £7,000 was a reasonable sum, could not then ask the judge to refer the question of what sum was reasonable to an official or special referee, though they might have asked him, in his discretion, to do so before adducing evidence. Further, where evidence has been so adduced before the trial judge, the Court of Appeal cannot be asked to refer the matter.

The appeal was dismissed on the above ground, but their Lordships stated their views upon the construction of the Landlord and Tenant Act, 1927, s. 19 (2), as follow:—

(iii) improvements within the meaning of the above subsection must be improvements from the point of view of the tenant and not necessarily from that of the landlord.

(iv) (GREENE, L.J., dissenting): such improvements are not necessarily alterations increasing the value of the demised property regarded

separately and by itself, but include alterations by which the tenant can, consistently with the other conditions of the lease, obtain the most beneficial user of the premises as premises, and include the user of the premises along with other premises, subject always to a provision for reinstatement. Such alterations may still be improvements, although they include the removal of party walls and fixtures from the demised premises, provided they are reinstated at the determination of the term.

(v) (GREENE, L.J., dissenting): the alteration of the demised premises by making them together with other premises into a composite shop, is not a breach of a covenant to use them as a first-class shop.

(vi) such alteration to form a composite shop was not a breach of a covenant against waste, because that covenant must be read subject to the previous covenant not to make alterations without the consent of the landlord.

(vii) the words in sect. 19 (3) requiring the landlord to grant his consent upon payment of a sum found by the court to be reasonable, only apply to that subsection and have no reference to the other subsections of that section.

[EDITORIAL NOTE.] While dismissing this appeal upon the short point that the appellants, that is the original plaintiffs, had not discharged the onus upon them of producing sufficient evidence to show whether the sum of £7,000 was or was not sufficient compensation for the alterations proposed to be made, their Lordships have expressed their views upon the construction of the subsection in question—Landlord and Tenant Act, 1927, s. 19 (2)—and, in particular, upon the incorporation of the premises included in a lease with other premises held from different landlords and the conversion of the whole into composite premises. It is, perhaps, a little unfortunate that their Lordships upon this question of composite premises, which is the real issue in this litigation, were unable to agree. This part of the judgment being in law merely an expression of opinion, will lose much of the force it might otherwise have had by reason of such disagreement. The question is very vital to the business interests concerned, and these interests—the large multiple-shop companies—must presumably seek another occasion to have their position under the section finally determined.

AS TO IMPROVEMENTS, see HALSBURY, Hailsham Edn., Vol. 20, pp. 212, 213, para. 231, and FOR CASES, see DIGEST Supp., Landlord and Tenant, Nos. 2995a, 2995b.]
Cases referred to:

- (1) *Balls Bros., Ltd. v. Sinclair*, [1931] 2 Ch. 325; Digest Supp.
- (2) *Treloar v. Bigge* (1874), L.R. 9 Exch. 151; 31 Digest 379, 5259.
- (3) *Lilley & Skinner, Ltd. v. Crump* (1929), 73 Sol. Jo. 366; Digest Supp.

APPEAL from a judgment of CLAUSON, J., delivered Mar. 2, 1936, in favour of the respondents, and reported in [1936] 1 All E.R. 333.

By a lease in 1915, the appellants acquired the premises known as No. 18, Commercial Road, Bournemouth, from the respondents. In 1927 the appellants made considerable alterations to the premises and for their consent the respondents exacted a fine or premium of £1,000. Later the respondents became possessed of No. 20, Commercial Road, premises next door to No. 18. The appellants surrendered their lease of No. 18 and the respondents demised to them Nos. 18 and 20 for a term of 42 years, from Feb. 28, 1931, at a rental of £3,500, rising to £3,750. The lease contained the following covenant:

... not without the previous consent in writing of the lessors to erect or suffer

to be erected any other building upon the said demised premises nor to make or suffer to be made any structural alterations in or additions to the demised premises except that they may carry out such alterations improvements and additions to the premises hereby demised whether or not involving any increase in the height or extent thereof in accordance with the plans which have already been submitted to and approved by the lessors and the local authority to the reasonable satisfaction of the lessors provided always that in the event of the lessee company making with the consent and approval of the lessors any further alterations improvements to or extensions of the demised premises at any time during the said term no fine or premium or increase of rent will be demanded for such consent and approval and further all the lessee company's covenants and conditions herein contained which are now applicable to the demised premises shall continue to be applicable to the same when and as altered and shall extend to all additions which may be made thereto at any time during the said term in addition to the covenants and conditions herein contained.

Another clause of the lease contained a covenant by the lessees that they would :

not carry on or suffer to be carried on in or upon or about the demised premises or any part thereof any noxious or offensive trade business or calling whatsoever but to use occupy and preserve the demised premises as a first-class shop suited to the neighbourhood and such as shall be in no way detrimental to such neighbourhood as being unsightly offensive or noisy and at all times of the year during the usual business hours of the locality to keep the demised premises open as a first-class shop or shops and to use the best endeavours of the lessee company to develop extend and improve the said business and not to do or suffer to be done anything to injure the connection or goodwill of such business but nothing contained in this lease shall prevent the lessee company from carrying on its business on the demised premises as now carried on at its other branches in the United Kingdom or from selling on the demised premises such goods as are usually sold by it at such branches.

There was also a covenant by the lessees :

not to commit or suffer to be committed any waste spoil or destruction on the demised premises.

At the time the lease was granted, and at the present time, the property was laid out as a shop, with various staircases, lavatory accommodation and various apparatus, necessary for carrying on the shop in accordance with the best practice of shopkeeping.

The appellants, having acquired a tenancy of a piece of land at the rear of the demised premises, and a small strip at the side, desired to pull down the back wall of the shop on the demised premises and to open up the demised premises so as to join to the piece of land at the rear, in order that they might erect on the whole property one large shop. Among the alterations proposed were the removal from the demised premises of the main staircase, the lavatories and staff accommodation, heating and ventilation appliances.

In answer to the appellants' request for a licence or consent to these proposed alterations, the respondents maintained that the proposed

alterations would diminish the value of the demised premises and demanded for their licence the payment of £7,000 and the costs of the licence and also a covenant that the appellants would reinstate the demised premises at the expiration or sooner determination of the term.

The appellants considered the sum demanded to be inordinate and they made the following counter-proposal :

(a) An undertaking to reinstate the demised premises at the end or sooner determination of the said term in the condition in which they now are, (b) securing the performance of the said undertaking by a policy of insurance in an office of repute or in such other manner as may be satisfactory, and (c) payment of such sum (if any) as a court might deem reasonable in respect of the damage (if any) to the demised premises or the diminution in value (if any) of the demised premises to be caused by the carrying out of the said improvements.

The respondents refused their consent and the appellants sought a declaration under the Landlord and Tenant Act, 1927, s. 19 (2) that the respondents were not entitled to withhold their consent, and that they (the appellants) were entitled without further request for licence or consent to make the proposed alterations subject to the covenants contained in the counter-proposal.

CLAUSON, J., held : (i) If the demised premises were considered alone, the proposed alterations were not an improvement within the Landlord and Tenant Act, 1927, s. 19 (2) ; (ii) The respondents' refusal of consent to the proposed alterations was not unreasonable for the following reasons : (a) the alterations would convert the shop, in breach of a covenant in the lease, into part of a shop not usable alone ; (b) the alterations would substantially alter the character of the demised premises ; (c) the respondents had expressed willingness to give their consent on payment of a sum which would substantially compensate them for loss in the selling value of the demised premises ; (d) there were considerable difficulties in the way of reinstatement at the end of the term. (iii) The court can on proper evidence determine whether a sum offered in respect of damages is a reasonable sum, but it has no jurisdiction to direct an inquiry as to what would be a reasonable sum.

Sir William Jowitt, K.C., Fergus Morton, K.C., and S. P. J. Merlin for the appellants.

Cyril Radcliffe, K.C., and Roger W. Turnbull for the respondents.

Sir William Jowitt, K.C. : The Landlord and Tenant Act, 1927, was designed to prevent a landlord, who himself is not showing initiative or enterprise, from profiting from a tenant who is showing enterprise. If a tenant undertakes to pay whatever a court thinks is a reasonable sum, that is a correct and businesslike method of approaching the matter.

Fergus Morton, K.C., following on the same side: If the alterations have the effect of enabling the tenant to carry on his business on the demised premises and, if necessary, elsewhere, they are improvements (*Lilley &*

Skinner, Ltd. v. Crump (3)). A landlord cannot withhold consent unreasonably to the making of an alteration or an addition which constitutes an improvement (*Balls Bros., Ltd. v. Sinclair* (1)). If there is a dispute between landlord and tenant as to what is a reasonable sum to be paid by way of compensation for any diminution in value of the demised premises, in order to decide whether the landlord is unreasonably withholding his consent, the court must decide as to the reasonableness of the sum.

Cyril Radcliffe, K.C. : Sect. 19 (2) does not apply unless there is a covenant against improvements. Improvements to the composite property cannot constitute improvements of the demised premises considered alone. By the covenants of the lease the appellants were not entitled to make the intended alterations, and, therefore, the respondents could not be held to have unreasonably withheld their consent to such alterations. Although there is jurisdiction in the court to decide whether the sum offered by the tenant or demanded by the landlord is reasonable, there is no jurisdiction to direct an inquiry as to what is a reasonable sum for the tenant to pay the landlord.

LORD WRIGHT, M.R. : This is a very important case, to my mind, because a result of these proceedings, whatever else they may produce, has been to leave the vital question in the air. The plaintiffs here, as I understand the position under the Act, to which I shall refer in a moment, have to establish that the defendants, as landlords, have unreasonably refused to grant a licence or consent to certain alterations or improvements on the demised premises, which the plaintiffs, as lessees, were desirous of making.

In order to determine that issue it was necessary to determine whether a particular sum which the landlords claimed was or was not a reasonable sum in respect of any damage to or diminution in the value of the premises or any neighbouring premises belonging to the landlords. The sum which was the subject of dispute up to the date of these proceedings was £7,000, and the learned judge, who has to deal with various other matters, to some of which I shall have to refer, has come to the conclusion that the evidence does not enable him to say that £7,000 was either reasonable or unreasonable and on that footing, and also on the view that the onus to prove that the licence has been unreasonably refused lay on the plaintiffs, he has dismissed the action.

Much as I regret this abortive conclusion, it seems to me that it must stand here. I feel that the matters at issue in these proceedings cannot be determined without a definite ascertainment of the reasonable sum, or rather, whether the sum of £7,000 was a reasonable sum within the meaning of sect. 19 (2) of the Act ; and although the court has a discretion in proper cases of referring any issue of fact to a special referee

or to an official referee, I do not think, in all the circumstances of this case, that this is a case where the court ought to take that course. The parties must now be left to take whatever further steps they may think fit and proper and, no doubt, the plaintiffs may be minded to take other steps, either by proceedings at law or otherwise, in all the circumstances of the case. But so far as this action is concerned, I have come to the conclusion, very reluctantly and with much regret, that on the short ground which I have stated, the appeal must be dismissed.

I do not desire to leave the matter with that bald statement. The learned judge has laid down some principles as to the construction of the statute, which appear to me not only of importance and far-reaching consequences, but, if I may say so with the greatest respect, both to him and to anyone else who may take another view, to be unfounded and not in accordance with the true construction of the statute. I think it my duty, having expressed the opinion that I have, to say that, and not to leave the decision on the simple and unsatisfactory ground which I have already put.

The section in question has been already read. It is the Landlord and Tenant Act, 1927, s. 19 (2). That Act, as is well known, was intended to extend, in certain respects, the rights of lessees, and in particular, to increase their power of making a beneficial use of the property of which they were lessees, notwithstanding the obstruction or demands of their lessors as landlords.

The subsection in question, with that object in view—and I do not refer to this object as determining in any way the construction of the subsection, which must depend on the actual language used—the subsection in effect provides that where there is a covenant against the making of improvements without licence or consent, that covenant, whatever the terms of the lease may be, is to be deemed subject to a proviso or term that the licence or consent is not to be unreasonably withheld. So far that is for the benefit of the lessee. The subsection, however, proceeds to lay down certain rights in favour of the landlord, so that his position may not be unduly prejudiced. He is not to be entitled, it is true, to bar the development of the premises in a proper way by means of improvements by the lessee, but he is to be protected by being given the right of requiring, as a condition of his licence or consent, the payment of a reasonable sum in respect of any damage to or diminution in the value of the premises or any neighbouring premises belonging to the landlord and various other matters. Furthermore, the landlord is given a right, in cases of improvement which does not add to the letting value of the building, to require as a condition of such licence or consent, where that requirement is reasonable, an undertaking on the part of the tenant to reinstate the premises in the condition in which they were before the improvement was executed. I said it

gave him a right in that latter event; the exact language is that it does not preclude the right—I do not know whether that difference may be material in certain events.

I only need to refer to one other part of sect. 19: that is the paragraph appended to sect. 19 (3), which provides that:

Where a dispute as to the reasonableness of any such sum has been determined by a court of competent jurisdiction, the landlord shall be bound to grant the licence or consent on payment of the sum so determined to be reasonable.

There is no corresponding clause appended to subsect. (2). The clause I have read can only apply to subsect. (3) because of the final words: “the landlord shall be bound to grant the licence or consent on payment of the sum so determined to be reasonable.” In the case of subsect. (2), it is perfectly plain that there are many other conditions which are to be determined, besides the mere amount of the reasonable sum in question. It is the absence, I think, of any such paragraph in reference to subsect. (2), which has led to many of the arguments and much of the difficulty in this case.

Now, as to the facts. They are, from one point of view, rather complicated, but I shall state them as broadly and as simply as I can. First of all, I must refer to the lease in respect of which this question arises. It is dated Feb. 27, 1931, between the defendants, the lessors, and the plaintiffs, the lessees. It is a demise of a piece of land situate in Commercial Road, Bournemouth, together with the buildings, shops and premises erected thereon, and known as No. 18, Commercial Road, and No. 20, Commercial Road, Bournemouth. They had been separate premises, but Messrs. Woolworth had acquired them both and turned them into one shop in a manner which is very common and perfectly well known of turning two premises into one. The lease is for a period of 42 years at a rent of £3,500, rising to £3,750. There are covenants on the part of the lessees, and I must refer to certain of them. Para. 2 (iv) of these covenants is a repairing covenant, the language of which is not unimportant:

From time to time to well and substantially repair, cleanse, maintain, amend and keep the demised premises and all new buildings, structures, and erections which may at any time during the said term be erected on, and all additions which may be made to, the demised premises and the landlords' fixtures thereon and the appurtenances thereof.

Sub-para. (v) is a covenant by the lessees:

not without the previous consent in writing of the lessors to erect or suffer to be erected any other building upon the said demised premises nor to make or suffer to be made any structural alterations in or additions to the demised premises.

That word “nor,” I think, is miswritten for “or,” and I think the second paragraph, as much as the first, is governed by the words:

“without the previous consent in writing of the lessors.” That is the covenant which I shall have to deal with a little later when I come to the application of the subsection. The rest of the clause I do not intend to read.

I think I need only refer to two other clauses in the lease. One is sub-para. (xi):

Not to carry on or suffer to be carried on in or upon or about the demised premises or any part thereof any noxious or offensive trade business or calling whatsoever but to use occupy and preserve the demised premises as a first-class shop suited to the neighbourhood and such as shall be in no way detrimental to such neighbourhood as being unsightly offensive or noisy and at all times of the year during the usual business hours of the locality to keep the demised premises open as a first-class shop or shops and to use the best endeavours of the lessee company to develop extend and improve the said business and not to do or suffer to be done anything to injure the connection or goodwill . . .

and so forth.

Then there is sub-para. (xii). The lessees covenant:

not to do or permit anything in or upon the demised premises or any part thereof which may be or become a nuisance annoyance disturbance or damage to the lessors or their tenants or occupiers of other property in the neighbourhood nor to commit or suffer to be committed any waste spoil or destruction on the demised premises or any part thereof and not to apply for an excise licence or use the demised premises for the sale of malt or spirituous liquors.

I have read these paragraphs now, and having read them, I shall be able to state quite shortly the effect which is or is not in my opinion to be attributed to them.

The lessees having entered into possession of these premises—or rather, they had been in possession before the lease—desired to make certain alterations because their business was extending, and they wished to make, as I understand, the best use for the purposes of their business, of the demised premises. What they sought to do was this. They sought to remove the back wall of those premises and to build at the back of the premises a further building, a part of which would be on an unused vacant piece of land, which was a portion of the demised premises, and part of which would be on other land belonging to a Commander Monro at that time, whose land was apparently vacant, but the plaintiffs had obtained a lease of it and within the limits of that lease were proposing to build these new premises, which would have been a continuation or extension of the original shop.

There is also a further minor alteration which they contemplated. That was the taking in of a strip of land from premises on the side of the demised premises in order to cut off and straighten out a small angle and thereby make the use of the demised premises more advantageous, because the demised premises were the front part of the shop, the part

to which the public would naturally resort, and it was desired to make them as convenient as possible.

Then, if the new premises were built at the back, the existing staircase which had been at the back of the original shop would have to be moved back, or would conveniently be moved back; and in addition the plaintiffs desired to remove the lavatory accommodation and the stairs and the heating and ventilation appliances to the proposed new part of their establishment, again leaving the front of the shop more advantageously employed for the purposes of the public trade. I think that is sufficient to indicate the general nature of these proposals.

Certain correspondence took place between the parties, and the result was a letter of May 13, 1935, from the defendants' solicitors to the plaintiffs' solicitors, which was in these terms :

Dear Sirs, We have now fully considered your request for a licence to allow certain alterations to 18 and 20, Commercial Road, Bournemouth. Our clients take the view that the work which you desire to carry out would diminish the value to them of the premises and they are not willing to grant a licence except on the footing of (a) the payment of £7,000 and the costs of the licence and (b) the execution by your clients in a form approved by our clients of a covenant to reinstate the premises at the expiration or sooner determination of the term.

The letter was clearly dealing with the two rights which were secured to the landlord as a condition of his granting a licence or consent, because there was no question between the parties that there should be a covenant to reinstate. I do not know whether all the terms were definitely agreed, but, anyhow, it is not suggested that there is any real difficulty about agreeing on that. The bone of contention was the £7,000. The plaintiffs took the view that, having regard to the rent they were paying and to the nature of the alterations, there was no need to pay anything at all, but they did not adhere to that view, because, in answer to that letter which I have just read putting forward their contention, they pointed out that they considered the sum of £7,000 was an inordinate sum. They added :

We can only surmise that your clients are demanding such a sum as a fresh basis for negotiation, and we are instructed therefore to make you the following counter-proposal.

The counter-proposal which is made for this purpose is :

that in return for a licence to carry out the said work, they should pay to the lessors a reasonable sum in respect of any damage to or diminution in the value of the premises (if any) such sum to be ascertained by the court if not agreed.

That proposal was rejected and thereupon a writ was issued.

The form of the action, I think, needs to be observed. The issue is put in para. 6 of the statement of claim in this way :

By letter dated May 13, 1935 [the letter I have just read] the defendants refused

their consent to the making of the said improvements except on the footing (*inter alia*) of the payment by the plaintiffs to the defendants of the sum of £7,000.

Then they ask for a declaration to the effect that they :

are entitled to make the said improvements without any further request for licence or consent on the part of the defendants but subject to the plaintiffs : (a) undertaking to reinstate the demised premises at the end or sooner determination of the said term in the condition in which they now are, (b) securing the performance of the said undertaking by a policy of insurance in an office of repute or in such other manner as this honourable court may deem satisfactory, (c) paying to the defendants such sum (if any) as this honourable court shall deem to be reasonable in respect of the damage (if any) to the demised premises or the diminution in value (if any) of the demised premises to be caused by the carrying out of the said improvements under the conditions (a) and (b) mentioned above.

Now, as to that claim for a declaration, I must point out at once that, in my opinion, it is irregular and not such as the court ought to entertain. The question at issue was whether, in all the facts of the case, the defendants had unreasonably withheld their licence or consent, and though it may be, and I think it was, the fact, apart from questions which were raised in the course of the trial, that the real issue was whether £7,000 was or was not a reasonable sum, that was merely subordinate to the decision of the matter essentially in question, namely, whether there was an unreasonable refusal of the licence.

The matter went to trial and evidence was given by experts, two on each side, on the question of whether £7,000 was or was not a reasonable sum for the defendants to exact as a condition of their consent. The experts for the plaintiffs' side thought there was no diminution in value at all and therefore no sum ought to be exacted. On the other hand, the two experts called for the defendants said that £7,000 was the proper sum, or a still larger sum, I think, of £11,000 odd. But there was no specific or detailed evidence except that of those two gentlemen on each side who gave their views. There was, to my mind, and I have read the evidence carefully, no adequate material on which any conclusion could be arrived at as to what was a reasonable sum, and, as I have said, on that ground the appeal must fail.

The learned judge really dismissed the action on other grounds, grounds of principle on which I must say a few words. He expressed the view, in the first instance, that the Act did not apply at all, because what was proposed could not be regarded as in law improvements within the meaning of the subsection. Of course, if that was right, the matter would be at an end, but, in my view, with the greatest respect, I construe the word "improvement" differently.

There are two questions to be considered in a matter of this sort : first, whether the proposed alterations or improvements are of such a character as not in law to be capable of coming within the provisions of

the Act; secondly, if that matter of law is answered in favour of the plaintiffs, whether the proposed alterations are in fact within the meaning of the Act. Now the word "improvements" is here used not as importing that the covenant, condition or agreement referred to must contain those words, because they would not, I imagine, generally be used. The subsection refers to any covenant against alterations without licence or consent. I do not stop to consider whether these words are essential or not to be expressly found in the covenant. If you have such a clause, in whatever terms, and the proposed alterations are in fact capable of being deemed to be improvements, then the section would apply.

It is said here that the word "improvement" means an improvement first of all from the point of view of the landlord. I think the learned judge was not disposed to accept that; in fact he rejected that, but construed the word "improvements" as meaning improvements from the point of view of the tenant. I think he was right in that, and he followed a decision of LUXMOORE, J., in *Balls Brothers v. Sinclair* (1), and an earlier decision of ROWLATT, J. (3), and I agree completely with that decision and the reasons given, and I say no more about it.

Then it was said there cannot be improvements within the meaning of the section because, even regarding the matter from the point of view of the tenants, they must be improvements of the demised property specifically, and in this particular case the proposed alterations were not improvements, and so far from increasing the value of the demised property regarded separately and in itself they had just the opposite effect. There was some picturesque language used about it. They were improvements which had the effect of removing a necessary part of the shop, as regards an isolated shop, such as the main staircase, the heating and lavatory arrangements, and in particular the back wall. It was said that the effect would be to destroy the premises as a shop altogether, and therefore could not in law be treated as improvements. I do not take that view. I think the word "improvements" is used here in a wider sense. The question, being regarded from the point of view of the tenant, is: how can he get, consistently with the other conditions of his lease, the most beneficial user of these premises as premises? One way of achieving that result may be to use these premises along with and in conjunction with some other premises, and to achieve that result some structural alterations may be, and probably always will be, necessary. Take the case where it is desired to include an adjoining shop, as was done in the case of Nos. 18 and 20, Commercial Road, originally. Or take the case where, in order to make the best use of a shop opening out in the street, it is desirable to remove to another position ancillary conveniences and apparatus. For instance, it might be desirable to shift the heating and other apparatus and lavatories to adjoining premises, making any necessary openings for that purpose,

and it might be desirable for that purpose to take out of the shop those things which are provided for in other quarters. In all these cases the shop would cease to be a self-contained shop, and, in a sense, some part of it would be dismantled. There would be structural alterations, but the result would be that, from the point of view of the tenant, he would be getting during the period of his lease a more beneficial user of the demised premises.

That, I think, is exactly what was proposed here. Instead of taking any of the adjoining premises at the side, the premises were to be extended at the back, and in that new back portion the various ancillary provisions which originally were on the demised premises were to be shifted to the new or additional premises. The effect of all that was to give a more beneficial enjoyment to the lessee.

Now, it is perfectly true that, for the purpose of the lease, all that is material is what happens on the actual demised premises. For the purpose of the lease it is not necessary to look beyond to other premises in other occupations, and that being so, and the tenant's enjoyment being what is considered for the period of his lease his enjoyment consistent with the other conditions of the lease, there does not seem to me to be any reason at all for saying that from that point of view these alterations would not be improvements of the demised premises, that is to say, taking the user of the tenant during the period of the lease. Of course, if structural alterations are made, if the proposals are to be carried out, it is necessary to provide for reinstatement at the conclusion of the lease of these premises; and that is adequately provided for in the proposals by the undertaking of Messrs. Woolworth, supported by the guarantee of an approved insurance company. The precise terms of that undertaking may meet with some little objection, but, as I have said, no real difficulty arises about it.

In my view, therefore, not only are these proposed alterations of the demised premises alterations which are in law capable of being construed as improvements, but in fact, on the true construction of this clause, they are improvements, and, with the greatest respect, I am unable to follow the view of the learned judge on that point.

There are only two other matters which I need refer to in this connection. One is that it is said that to make these alterations and to carry on the business in the way contemplated by these alterations, that is to say, to carry on the business of Messrs. Woolworth in Nos. 18 and 20, Commercial Road, and on the premises extended at the back, and to a slight extent to the side, would be a breach of the covenant which I have already read, that is to say, that there would no longer be a use, occupation and preservation of the demised premises as a first-class shop suited to the neighbourhood. I am entirely unable to think that what is proposed would be a breach of that covenant. The premises would

be used as a first-class shop, just as much as before the alteration, if the alterations were ever carried out. The covenant itself seems to me to be directed to some entirely different danger or risk, namely, that the premises would be used for some other purpose than that of a first-class shop, and there would be a breach clearly if it was sought to use those premises as a motor garage, or as a cinema, or for any other purpose of that sort. In my view, if these alterations are effected and the business is carried on as contemplated, these premises would still be used as a first-class shop, and indeed, forming part of the first-class shop, some other premises not part of the demised premises.

In a case of this sort, it may be necessary to consider the exact nature of the alterations, in order to see whether or not they constitute any breach of covenant such as sub-para. (xi). In the circumstances of the present case, I do not think that the contemplated use of the premises would amount to any breach. If hereafter it turned out that the premises were being used in a way which was contrary to sub-para. (xi), the question would be open then, but at present I see no reason to think that any breach of that covenant would be committed. As to sub-para. (xii), to which I have already referred, though these alterations would involve pulling down a wall and removing certain ancillary apparatus from the building and would change the construction in various other respects in the way I have indicated, I do not think that that constitutes any waste, spoil or destruction of the premises within the meaning of sub-para. (xii). I do not intend to discuss that any further, because to my mind, that condition has no reference to anything of this sort.

It is not necessary to consider clause 3, condition (ii). I am quite satisfied to say that the proposed alteration would constitute, as far as I can see, no breach of any of the covenants of this lease. That being so, the matter of debate now, in my opinion, is left entirely to rest on this one issue of whether £7,000 was or was not a reasonable sum to demand. If it had been proved that it was an unreasonable sum to demand, then I think the tenant would have succeeded in proving that consent was unreasonably withheld. I have not come to that conclusion. On the evidence before me, I apprehend that the matter will be open now. Attempts have been made to induce the defendants to agree to submit this one issue to arbitration. They are not bound to submit it to arbitration, and the plaintiffs, therefore, if they desire to proceed in this matter, and if my view of the construction and application of the section to the facts of this case prevails, will be able to take such action as they think fit, in order to meet this serious difficulty about the question of the reasonable sum. I do not pretend to follow out the various possibilities, some of which have been considered in the course of the argument. It is enough to say that, for the reasons I

have given, however unsatisfactory the result may appear, this appeal fails and should be dismissed with costs.

ROMER, L.J. : The plaintiffs in this case allege that the defendants, their landlords, have unreasonably withheld their consent to the making by the plaintiffs of certain alleged improvements on the demised premises, and they claim two declarations as the statement of claim is amended.

The first declaration is : that in the events which have happened, which means, that the defendants having unreasonably withheld their consent to the making of the improvements, the defendants are not entitled to withhold their licence or consent any further. That declaration is based upon a misapprehension of the true effect of a covenant not to do something without the licence of the landlord, such licence not to be unreasonably withheld. The insertion in the covenant of the words "such licence not to be unreasonably withheld" does not amount to a positive covenant on the part of the landlords that they will not unreasonably withhold their consent, and compel them to grant a licence on reasonable terms. That was held in the case of *Treloar v. Bigge* (2), and is well-recognised law upon that footing. If the landlords unreasonably withheld their consent, then there is no covenant on the part of the lessees at all relating to the subject matter, because the words, "such consent not unreasonably to be withheld," import a condition into the covenant so that the covenant is conditional upon the consent not being unreasonably withheld ; the result being that, when a licence or consent is unreasonably withheld, there is no covenant on the part of the lessee at all, the condition not having been fulfilled. The first declaration, therefore, is plainly wrong, but, no doubt, it involved, if the declaration was to be made, the court arriving at the conclusion that the consent had been unreasonably withheld, and to that extent the first declaration sought may be by a beneficent construction regarded as a declaration that the landlords have withheld their consent unreasonably. I will come back to that in a moment.

The second declaration is this : that in the events which have happened (that is, consent being unreasonably withheld), the plaintiffs are entitled to make the said improvements without any further request for licence or consent on the part of the defendants, but subject to the plaintiffs doing various things. The third thing is :

Paying to the defendants such sum (if any) as this honourable court shall deem to be reasonable in respect of the damage (if any) to the demised premises or the diminution in value (if any) of the demised premises to be caused by the carrying out of the said improvements.

In other words, the plaintiffs are coming to the court and saying : "Please, tell us what would be a reasonable sum for the defendants to insist upon being paid as representing the damage they have suffered

in respect of their reversion." CLAUSON, J., took the view that the court had no jurisdiction to answer a question put to him in that way, and I agree with him. In my opinion this declaration could not possibly be made, even though the court came to the conclusion that the defendants hitherto have unreasonably withheld their consent.

I said that I would come back to declaration 1, and I will treat it now as though the plaintiffs ask for a declaration that the defendants had unreasonably withheld their consent. Mr. Fergus Morton, on behalf of the plaintiffs, said that they had unreasonably withheld their consent, as I understood his argument, not solely because the terms they had put forward in a letter were unreasonable, but because it was unreasonable on the part of the defendants to have refused an offer which the plaintiffs themselves had made in a letter, the date of which does not very much matter. The question whether the terms offered by the defendants were unreasonable depends entirely upon the question whether they might reasonably ask for payment of £7,000 in respect of the damage to be sustained by their reversion, because the other terms which they suggested are agreed by the plaintiffs to be quite reasonable, the terms being the covenant of reinstatement supported by a policy. The question whether the counter-offer put forward by the plaintiffs was one which the defendants ought to have reasonably accepted really involves precisely the same point, because it would be reasonable on the part of the defendants to refuse that offer of the plaintiffs. However reasonable the offer might have been in itself, if the defendants could say: "Our offer that we made was a reasonable offer," I cannot see that the defendants have unreasonably refused the plaintiffs' offer, if the defendants have put forward on their part a reasonable offer themselves. So that in either case the question resolves itself into this: Was the £7,000 offered by the defendants a reasonable sum for them to require? CLAUSON, J., after hearing the evidence, came to the conclusion, as I read his judgment, that he was not in a position to say that the defendants had been unreasonable in making that offer. It is said by Mr. Fergus Morton that the learned judge ought to have referred that question, if he felt any doubt about it, to the decision of an official referee under the Supreme Court of Judicature (Consolidation) Act, 1925, s. 88. After all, the plaintiffs had not asked him to do that. The plaintiffs called evidence and the defendants called evidence, and when the learned judge heard the evidence on both sides, he came to the conclusion that the plaintiffs had not discharged the onus that lay upon them. It was too late for the plaintiffs to say: "Well, now as we have failed to satisfy you on this point, refer it to an official referee." I think the learned judge was right in those circumstances in having dismissed the action, because, in his opinion, the onus was clearly on the plaintiffs of proving that the defendants had unreason-

ably refused their consent, seeing that they came to the court to ask for a declaration that such consent had been in fact unreasonably withheld.

In my opinion, on that ground this appeal fails, but there are various other points which have been argued before us, and we have been asked by counsel to express our views upon them.

By far the most important of those other questions is this: Are the alterations which the plaintiffs are desirous of making and to which they have asked the defendants to give their consent, improvements within the meaning of the Landlord and Tenant Act, 1927, s. 19 (2) ?

It has been held, and quite plainly rightly held, that the improvement may be an improvement within the meaning of the subsection, even though it does not improve the demised premises from the point of view of the landlord. That is plain, I think, from the fact that the subsection itself contemplates that the landlord's property may be damaged by the improvements, yet in respect of that damage he may reasonably ask for a sum to be paid to him as a condition of giving his consent. We, therefore, have to consider whether these alleged improvements are improvements from the point of view of the tenant. Of course, we have only got to consider improvements of the demised premises themselves. As I see it, the question is this: Will these alterations render the tenants' occupation of the demised premises more convenient and comfortable to them ?

In the course of the argument I ventured to give an illustration of an alteration of demised premises which would be an improvement from the tenants' point of view, in the sense that it would add to the reasonable enjoyment by them of the demised premises, even though it was an alteration in connection with premises which adjoin the demised premises. Mr. Radcliffe, as I understood him, did not dissent from the view that there might be such alterations that would be improvements within the meaning of the subsection. One of the illustrations I put to him was this: Supposing the tenant of a demised house is the owner of land which immediately adjoins the demised premises. If he can make an entrance or a passageway or whatever it may be from the demised premises on to this adjoining land, that may largely add to the comfortable enjoyment by him of the demised premises. No one would deny this. Another illustration I ventured to put was this: Supposing that a man owns an hotel and takes a lease of certain premises adjoining the hotel, floor to floor the same as his hotel; obviously it would add very considerably to his comfortable enjoyment of the demised premises if he could on each floor make a communication between that floor of the demised premises and the corresponding floor of his own property adjoining. I do not understand that Mr. Radcliffe would have disputed that, and that such alteration of the demised premises might be an improvement within the meaning of the subsection. The communication

might take the form of a door, but it might also take the form of an archway without a door. There would be no difference so long as at the end of the tenancy the tenant filled up the hole that had been made and restored the demised premises to their original condition. Nor could it make any difference, as I can see it, if, instead of making an archway, he removed a bit of the wall altogether, say the wall separating one room of the demised premises from the adjoining room of his own premises, and threw them all into one room, again, of course, on the condition that he filled it up and restored the demised premises to their original condition. The question always would be, as I see it, whether the alteration was one which would render his enjoyment of the demised premises more convenient.

Now, in the course of those alterations which I have suggested as being improvements within the meaning of the section, it might be found necessary to remove, say, a lavatory from the demised premises and replace it during the remainder of this tenancy by a lavatory on his own premises. By so doing he might have more floor space in the demised premises, and so add to the amenities of his occupation. If, as I think be the case, that illustrates the meaning of the word "improvement" in the subsection, how do the facts of the present case apply? Two persons were called on behalf of the plaintiffs, a Mr. Garratt and a Mr. Goddard. They were asked from their expert point of view whether the alterations would result in an improvement of the demised premises. Mr. Garratt said this :

They added some 600 or 700 yards of actual floor space to the two floors, the ground floor and the second floor, those are the two floors of the demised premises. Secondly, they have the added advantage of making the shop a better shop.

He points out how the alterations will enable the customers coming from the demised premises to be more conveniently dealt with and more conveniently do the business they had come in to transact in Woolworth's shop. Mr. Goddard expressed the same view. He also made reference to the fact that the alterations provided more commodious accommodation for the staff in the way of lavatories and things of that kind. Then he says that it was an improvement to take away the lavatory accommodation on the demised premises, so as to give the customers more room on the demised premises, and to substitute for that lavatory accommodation lavatory accommodation on the adjoining premises, of which Messrs. Woolworth also have a lease. The alterations suggested by Messrs. Woolworth also involve the removal of the existing staircase or one of the existing staircases on the demised premises. That, again, was to render the occupation by Messrs. Woolworth of the demised premises more satisfactory and more commodious from their own point of view. The staircase will now be upon the adjoining premises, of course, always subject to this, that when the tenancy of

Messrs. Woolworth in the demised premises comes to an end, the staircase, the lavatory and the walls will all have to be restored to their original condition.

For these reasons I am not prepared to come to the conclusion that the alterations Messrs. Woolworth are proposing to carry out are not strictly improvements of the demised premises within the meaning of the subsection.

The other points are comparatively small. I may say by way of comment that I entirely agree with the view that LORD WRIGHT, M.R., has taken as to the words to be found at the end of sect. 19 (3), that is to say, they only refer to matters referred to in subsect. (3), and do not affect subsects. (1) and (2). I would like to add this also. It was argued before us that every covenant not to make alterations or improvements is within the meaning of the subsection, a covenant not to make improvements without the licence or consent of the landlord. I cannot take that view at all, although, of course, it is true that every covenant can be released by the landlord if he thinks fit. Sect. 19 (1) deals with covenants against assignment, and long before this Act ever came into force the difference between an absolute covenant not to assign and a covenant not to assign without the licence or consent of the landlord was well recognised. LUXMOORE, J., I think it was, once said that he had never heard of a covenant by a lessee not to make improvements. Assuming that such a covenant was common, surely there would be a difference between a covenant not to make improvements of any kind in any circumstances and a covenant not to make improvements without the consent and licence of the landlord. Indeed, to hold otherwise, to accede to the argument addressed to us on this point, would be to disregard the words of the section altogether, namely, the words: "without licence or consent." If every covenant not to make improvements without licence or consent, and if every covenant not to assign, is to be treated as a covenant not to assign without licence and consent, and every covenant against the alteration of the user of the demised premises under subsect. (3) is to be deemed not to be a covenant to make an alteration of the user without the licence or consent of the landlord, then the words "without licence or consent" in the subsection would be otiose and useless.

The only other point I find it necessary to mention is this. It was said that there are two covenants contained in this lease, covenants that are not qualified in any way by the words, "without licence or consent," which would be broken if the lessees made the alterations in question. That was said to be important for two reasons. It was said, if that be so, the existence of those covenants was a matter which should be taken into consideration in deciding whether the landlords, in demanding £7,000, had unreasonably withheld their consent, and, secondly, that

supposing the landlords had unreasonably withheld their licence and consent, the tenants are at liberty to make any alterations they please, they nevertheless could be prevented from making these particular alterations by these two covenants. The words, "without licence or consent," are contained in sub-para. (xi) and (xii) of clause 2 of the lease. The first one is the covenant to keep the demised premises open as a first-class shop, secondly, to use, occupy and preserve the demised premises as a first-class shop. One must read those words as part of the whole covenant. The covenant begins as follows: "Not to carry on or suffer to be carried on in or upon or about the demised premises or any part thereof any noxious or offensive trade, business or calling whatsoever but to use, occupy and preserve the demised premises as a first-class shop suited to the neighbourhood." In my opinion, what that covenant is dealing with is the method of user of the demised premises, that is to say, that it is dealing with the nature of the trade which can be carried on upon the demised premises. As I understand it, the lessee covenants that the trade he will carry on upon the demised premises will be that of carrying on a first-class shop, and no other. When these alterations are made, Messrs. Woolworth in my opinion, will be carrying on the business of a first-class shop on the demised premises, just as, as it is admitted, they are at present.

The other covenant is one that creates greater difficulties, I think. It is a covenant not to commit or suffer to be committed any waste, spoil or destruction on the demised premises, but it must be remembered that we have, before we get to that, part of the covenant in question with which we have been dealing in sub-para. (v), that is to say, the covenant not to make any alterations or additions without the previous consent in writing of the lessors. In those circumstances, it seems to me that we must construe this last covenant, no. (xii), in such a way as not to conflict with covenant no. (v). It is almost incredible, I think, that lessees should have entered, first of all, into a covenant not to do these works in question, without the licence or consent of the lessors, and that later on, in the same clause of the lease, they covenanted that they would not make such alterations in any circumstances. I think we must exclude from the operation of this covenant in sub-para. (xii) any improvement to which the previous covenant in sub-para. (v) refers.

I think I have dealt with all the points that have been raised in argument, although, as I said before, it is sufficient to dispose of this case by saying, as CLAUSON, J., said, that the plaintiffs have not discharged the onus that lay upon them of showing and proving that the defendants had unreasonably withheld their consent.

GREENE, L.J.: I agree that this appeal should be dismissed on

the grounds stated by my Lords. On that ground I only wish to make two observations. The first one is this. It is, in my judgment, a misconception to treat the relevant subsection here as though it were a subsection conferring upon the court some remedial jurisdiction to relieve the lessee from a covenant or to modify it. It is, in truth, nothing of the kind. It is a statutory addition to the terms of a particular type of covenant, and the proviso which the subsection mentions is to be read into the covenant. What the legal consequences of that may be in relation to any particular set of facts is a matter which will fall to be determined in the usual way. It is quite wrong to look upon this as something which enables the court to say that a particular set of terms or some particular conditions would be the reasonable thing for the lessor to impose in the circumstances. The practical question which falls to be decided in matters of dispute under this is simply the question : Aye or no, has the covenant been broken ? Aye or no, does the covenant, or does it not, apply in the particular circumstances of the case ?

The other observation I wish to make is this : that the burden of proof is on the plaintiff, who alleges unreasonable refusal by the lessor. I quite agree that if, when the matter came before him, the learned judge, in his discretion or at the request of the parties, had referred, as he could have referred, the question as to the reasonableness of the sum which the lessors were demanding, to a special referee or to an official referee, no objection could have been taken to that course. It would have been perfectly permissible for the learned judge, in dealing with that particular issue, to give that direction as to how that issue should be tried.

That was not the course the trial took, nor did the plaintiff invite the learned judge to take any such course. The plaintiff elected to deal with that issue before the learned judge himself, and he came prepared, or as he hoped prepared, to discharge the burden that lay upon him with regard to the whole of the issue, and, in particular, with regard to the issue of reasonableness of the sum demanded. The learned judge held that he failed to discharge the burden. But Mr. Fergus Morton says, notwithstanding that it would have been permissible for the learned judge, if he was not satisfied, to refer the matter, it would be permissible for this court to refer the matter. With great respect to the argument, it seems to me that this is a misconception. If the issue which is the issue in this case is tried before the learned judge, and the onus of proof is not discharged, it is, in my judgment, not permissible for the plaintiff then to say : " Give me another chance by ordering a reference or an inquiry at which I may be able to produce more satisfactory evidence than I have produced at the trial." That seems to me, with all respect, to be an entirely novel conception of procedure, and it is a totally different thing to do that, on the one hand, and on the

other hand, to do what I think would have been permissible in this case, namely, to refer the trial of that particular issue to an official referee or a special referee, because then that would have been the trial of that issue. As it was, the trial took place before the learned judge, the onus was not discharged, as he held, and I agree with him.

With regard to the other matters that have been discussed in the case, I regret to find myself in disagreement with the judgments that have been delivered as to what is, perhaps, the most important matter in the case. That is the question as to whether the proposed works are improvements within the meaning of the subsection. I must confess that to find described in an Act of Parliament as improvements to demised premises, an alteration which involves removing the whole of the wall up, I think it is, three storeys on one side and part of the wall up three storeys on another, the removal of the staircase, the removal of the heating and ventilation apparatuses, and the removal of the lavatories—to find an Act of Parliament referring to those alterations as improvements of demised premises is, to my mind, something rather startling. If the legislature, on the true construction of the section, has so said, then all I can say is that its choice of language has been more than usually infelicitous. I approach this subsection, not from the point of view that it would have been reasonable for the legislature to have made provision enabling tenants to do what may very well be a very useful thing, but from the point of view that it is only from the language of the subsection that I am able to discover whether the object of the legislature was to effect a quite limited alteration in the law, or to make an alteration of a very wide and far-reaching description; and I myself can find no assistance in the solution of that problem beyond such assistance as is given by the language used. I will, therefore, venture to make a few observations on the construction of the subsection as it appears to me.

First of all, I think it is fair to observe this: that the improvements which are referred to must be improvements to what is the subject matter of the relevant covenant, and if it is not possible to predicate of any alterations that they are improvements to the subject matter of the covenant, to wit, the demised premises, they will not be improvements within the meaning of the subsection.

I am in agreement to this extent with what has been said: that in considering whether a thing is an improvement or not, the point of view of the tenant is to be regarded, not necessarily exclusively, but that the point of view of the tenant is a thing which ought to be regarded. But that does not answer the question; because it is as tenant of the demised premises that his point of view is to be regarded, not as tenant of some other premises or of some composite premises. It is said by Mr. Fergus Morton that the true test of an improvement is: is it beneficial to the

carrying on of the tenant's business? I am quite unable myself to discover, in the language of this section, any justification of such a test. It seems to me that it would lead to the most extravagant results, and it is no answer, in my respectful judgment, to say: "Oh, these results can be provided against because there is always the question in the background as to whether or not the consent has been unreasonably withheld in an extreme case." That is not the point. It is not until you have decided whether a thing is an improvement or not that the question of consent comes in. Therefore, it does not seem to me to be legitimate to give to the word "improvement" a meaning which leads to extravagant results and justify that by saying: "Oh, but there is a safeguard provided in the section." Just let me see what it means. Mr. Morton, in the course of his argument, in answer to a question put by myself, quite frankly, as I understood him, acceded to the point of view I put. I put to him this. Supposing it was beneficial to Messrs. Woolworth's business as carried on in the composite premises to remove one floor of the demised premises and use the roof of the floor above as, let me say, a tea garden or a restaurant, or something of that kind. Mr. Morton admitted, and I think he was bound to admit, that that would satisfy his test. It does seem to me a most extraordinary thing that the legislature could have used the word "improvements" to cover such an alteration as that.

The real truth of the matter is, in my judgment, this. The test of what is beneficial to the tenant's business is not the true test. The true test, I suggest, is this: that the improvement must be an improvement to the premises which are the subject matter of the covenant and not merely an improvement which derives its character, as such, from its effect and result upon some composite building. That reduces the matter to a question of fact and degree in each case. I quite agree that if a tenant has a house held from some lessor and has premises next door, it may very well be an improvement to make an opening from the one into the other. The reason why that would be an improvement, I venture to think, would be this: that the existence of that opening and that means of communication is a thing which improves the subject matter of the covenant, namely, the demised premises, from the point of view of the tenant as tenant of those premises, and does not derive its beneficial result merely from the fact that the tenant is the owner of some composite premises.

When you look at the present case, it seems to me impossible to say that the removal of the whole of this wall down one side of the premises, and a large part of another wall, can be called an improvement to the demised premises. It is desirable, and desirable only by reason of its effect upon the composite premises, and once you have to bring that consideration in, it seems to me that you are introducing something

which the section does not authorise you to introduce, because the section is concerned, and concerned only, with improvements to what is the subject matter of the covenant.

The matter looked at from that angle becomes even more striking when one considers some of the other things which it is proposed to do. It is proposed to remove the main staircase, to remove the heating apparatus, to remove the air conditioning apparatus, and to remove the lavatories for the male staff. All these things are part of the demised premises, and they are going to be taken right away. Now what is the benefit of that removal? Is it possible to say that it is an improvement to the demised premises that part of them should be taken away altogether, when the real benefit of that alteration is not a benefit to the demised premises at all, but is only a benefit when regarded in relation to the composite premises? It appears to me, with all respect, that on the facts of this case it is not possible to say that the suggested alterations fall within the meaning of the word "improvements" in the subsection, and that the only way by which they can be made to fall within it is by putting an interpretation on that word which leads to what appear to me to be the most extravagant results.

I think that is all that I need say with regard to the meaning of the word "improvements," but there is one other matter of argument on which I wish to say something. It is this. In the lease in question there are two covenants, one relating to user and one relating to the committing of waste, spoil or destruction. With regard to both of these covenants, they are covenants which are absolute in terms and do not contain the qualification that they are not to be done without licence or consent, and I agree that they are not covenants to which subsect. (2) would apply. I agree respectfully with, and do not wish to add anything to, what has already been said by ROWLATT, J., (3) with regard to the covenant against waste; but the covenant against user appears to me to stand in a rather different position.

I turn back for a moment to what I said at the beginning of this judgment: that this section is not a section which gives some general remedial power to the court, nor, may I add, is it a section which imposes on the lessor a statutory consent or something of that kind. If it did, I could quite understand the argument that a statutory consent to an alteration designed with a view to a particular user would operate *pro tanto* as a statutory release from the covenant prohibiting that user, in exactly the same way as a consent given by the landlord himself would have done. But that is not the operation of this subsection at all. The operation of this subsection is merely to write in a proviso to the particular covenant, or any covenant that may be found, the effect of which is to prohibit the making of what are improvements. The user covenant does not come under that category at all. You cannot find in the user

covenant any covenant against the making of improvements ; it is a covenant relating not to the alteration of the premises, but to their user.

There are two questions that arise on this covenant. The first one is this : Assuming those alterations were made and the proposed user took place, whether that would be a user of the premises as a first-class shop suited to the neighbourhood. I am not prepared to dissent from the view that it would, but that is subject to the next question, and the next question is this : the covenant relates to the user of the demised premises. Now the demised premises include not merely the bricks and mortar, but everything which forms part of the demised premises, among other things, the staircase and the heating apparatus, and other installations which are affixed to the freehold and, until removed, are part of the demised premises. The same applies to the men's lavatories and all the rest. How it would be possible, after these installations have been removed from the demised premises, to use the demised premises, of which they form part, as a first-class shop, I, for one, quite fail to see. What will be happening will be this. I assume here that the business of buying and selling and so forth, that element of user, will still be user as a first-class shop. But I am quite unable to see how it can be said that in those circumstances the tenant would be using the demised premises ; he would be using the demised premises minus the things which he has taken away from them. The result of that will be that if the removal of those things takes place, in my opinion it will be impossible thenceforth for the covenant to be carried out. If that be so, I cannot see myself that it can be said that a refusal by the lessor to an alteration, the object of which is to enable the premises to be used in a way inconsistent with this covenant, is unreasonable.

That, I think, deals with all the matters in the case. I need only express my agreement with the views that have been expressed as to the words at the end of sect. 19 (3). I am unable to see how those words can be, on a true construction, referred to the relevant subsection with which we are dealing.

Appeal dismissed with costs. Leave to appeal to the House of Lords refused.

Solicitors : *Lovell, White & King* (for the appellants) ; *Robins, Hay & Waters*, agents for *Lacey & Son*, Bournemouth (for the respondents).

[*Reported by H. P. LANSDALE-RUTHVEN, ESQ., Barrister-at-Law.*]

Re SHARMAN AND MEADE'S CONTRACT.

[CHANCERY DIVISION (Farwell, J.), July 10, 16, 1936.]

Sale of Land—Conveyance—Description of parcels—Right of purchaser to insist on plan.

The draft conveyance of certain property delivered by a purchaser to a vendor identified the property by reference to a plan to be annexed to the conveyance. The vendor contended that the purchaser was not entitled to such a plan unless the purchaser paid the costs of the vendor's surveyor, which the purchaser refused to do, and he suggested that the property could be satisfactorily identified by saying that it was known by a certain number in a certain street and was bounded by other properties similarly described. The purchaser took out a summons to have the question determined:—

HELD: the duty of a vendor is to convey under a description which is a sufficient and satisfactory identification of the land sold, and in the present case identification by reference to a certain number in a certain street was a sufficient and satisfactory identification.

[EDITORIAL NOTE.] It has been suggested that the result of *Re Sansom and Narbeth's Contract* (1) was that in simple cases a purchaser can insist on a plan, but it is here held that that was not the real effect of the judgment of SWINFEN EADY, J., in that case, and that the duty of a vendor is to convey under a description which is a sufficient and satisfactory identification of the land sold. Where this can be effected without a plan, the purchaser has no right to insist upon one. It will be noted that the description contains no measurements of any kind, and that it is held to be sufficient where there is practically no space uncovered by buildings.

AS TO DESCRIPTION OF PROPERTY CONVEYED, see HALSBURY, 1st Edn., Vol. 25, Sale of Land, p. 423, para. 739; and FOR CASES, see DIGEST, Vol. 40, pp. 275–278, Nos. 2397–2416.]

Cases referred to:

- (1) *Re Sansom & Narbeth's Contract*, [1910] 1 Ch. 741; 40 Digest 277, 2415.
- (2) *Re Sparrow & James' Contract* (1902), [1910] 2 Ch. 60; 40 Digest 276, 2407.

VENDOR AND PURCHASER SUMMONS raising two questions: (a) as to whether a purchaser is entitled to insist in having in the conveyance of the property agreed to be sold a reference to a plan of such property; and (b) as to the duty of the vendor to give information in respect of tenancy agreements subject to and with the benefit of which the property is sold.

By a contract dated Mar. 4, 1936, the respondent to the summons, Albert George Sharman, agreed to sell and the applicant in the summons, Nellie Elizabeth Meade, agreed to buy, for the price of £1,300, a piece or parcel of land situate in the County Borough of Brighton together with the messuage or dwelling-house erected thereon and known as No. 27, Norfolk Square. In accordance with the terms of the contract completion was to take place on Mar. 25, 1936, and by clause 6 thereof it was made subject to the tenancy agreements, particulars of which were set out in the second schedule to the contract. Of these tenancy agreements the

only one material to these proceedings was dated Mar. 10, 1915, and by it a portion of the premises comprising the whole of the first floor and all the rooms above with the use of the staircase and hall and front private entrance in common with the other occupiers of the house, was let on a quarterly tenancy to one William Larder. The abstract of title to the property to be sold started with a conveyance of Oct. 12, 1909, which contained a description of the property by reference to an earlier deed of 1846, and the draft conveyance delivered by the purchaser to the vendor contained the words "as the same is for the purpose of identification only and not by way of limitation or extension of grant more particularly delineated and described in the plan hereon and thereon coloured pink." The vendor struck out these words in the draft conveyance and contended that the purchaser was not entitled to such a plan unless she paid the costs of the vendor's surveyor in having it checked. That the purchaser refused to agree to.

The difference between the parties with respect to the tenancy agreement arose from the fact that the only particulars given by the vendor to the purchaser of that agreement was that the original tenant was a statutory tenant who subsequently died and that his widow remained in occupation under her rights under the Rent Restriction Acts.

The summons therefore asked for :

(i) A declaration that in the conveyance of the above-mentioned property to the purchaser she is entitled to have the same described by reference to a plan, such plan being expressed to be for the purposes of identification only and not by way of limitation or extension of grant.

(ii) A declaration that the vendor has failed to show a title to the said property according to the said contract, in that he has failed to show that the occupier of the upper maisonette holds the same subject to the agreement of tenancy dated Mar. 10, 1915, in the second schedule of the said contract referred to.

Raymond Jennings for the applicant, the purchaser : There is no doubt as to what the identity of the property is, but that is no reason why it should not be properly described in the conveyance. The authorities substantiate this position that in an ordinary simple case the purchaser has a right to have a plan : see *Re Sansom & Narbeth's Contract* (1), and *Re Sparrow & James' Contract* (2). I am asking for much less than what was given in *Re Sansom* (1). The plan I ask for is in the most innocuous form and is the most convenient way of identifying the property as is shown by the vendor's own affidavit. It is not a sufficient and satisfactory identification of a house in a town to say that it is a house known by a certain number in a certain street and is bounded by other houses similarly described. The numbers or the name of the street might be changed or the houses pulled down. See also DAVIDSON'S PRECEDENTS OF CONVEYANCING, 4th Edn., Vol. 1, p. 84.

As to the tenancy agreement the purchaser was given no information

which would enable her to determine whether the tenant's widow was justified in remaining in occupation. Merely to say that she was holding over under her rights as the widow of a tenant who had died while in occupation was not sufficient to fulfil the vendor's duty to make such title as he could.

C. Montgomery White for the respondent, the vendor: All that the vendor has to do is to convey the property by a description sufficient to identify it. The headnote in *Re Sansom & Narbeth's Contract* (1) goes too far. See the comments on this case in WILLIAMS ON VENDOR AND PURCHASER, 4th Edn., p. 651, which are fully justified. The property in this case is sufficiently identified without a plan. There is nothing in the suggestion that it is not properly described because the numbering of the houses or the name of the street may be changed. That might arise in connection with any property and adequate notice of such changes is always given by the local authority.

With regard to the tenancy of the maisonette, it is clear from the correspondence that the purchaser, if she ever had any valid objection, waived it long before the date of the summons as she accepted from the tenant a notice to quit. With regard to the objection itself it would be an extraordinary result if a vendor had to trace his tenant's as well as his own title, which is what the purchaser's demand amounts to.

Raymond Jennings in reply: The limitations which the editors of WILLIAMS ON VENDOR AND PURCHASER seek to put on the authorities I have cited is not justified. The relevant passage is the paragraph beginning at the bottom of p. 662. No conveyancer would consider the description of the property offered by the vendor here a sufficient and satisfactory form of parcels to be put in a conveyance. In DAVIDSON'S PRECEDENTS ON CONVEYANCING it is stated quite clearly that such a description is not sufficient when one is dealing with houses in a town, and the principle is stated quite clearly by SWINFEN EADY, J., in *Re Sansom & Narbeth's Contract* (1), which was a case of a house in a town.

FARWELL, J.: This is a summons taken out by the purchaser against the vendor under a contract of Mar. 4, 1936, whereby the vendor agreed to sell and the purchaser agreed to buy a house. [His Lordship read the summons.] The contract in question is, as I have said, dated Mar. 4, 1936. It was made between Albert George Sharman, who is respondent to the summons and Nellie Elizabeth Meade, who is the applicant, and by it the vendor agreed to sell and the purchaser agreed to purchase the freehold property shortly described in the first schedule thereto for an estate in fee simple absolute in possession free from incumbrances, except as thereafter mentioned. When one turns to the first schedule one finds that it contains these words "All that messuage or dwelling-house situate and being No. 27 Norfolk Square Brighton in

the County of Sussex." By clause 2 of the agreement it is provided as follows :

The property is sold subject to the Sussex Law Society's conditions of sale incorporating the Law Society's conditions of sale, 1934 edition, so far as the same are applicable to a sale by private treaty and are not inconsistent herewith and to the special conditions herein contained.

And clause 6 provides :

The property is sold subject to and with the benefit of the respective tenancy agreements short particulars whereof are set out in the second schedule hereto.

The second schedule contains particulars of an agreement dated Mar. 10, 1915, the parties to which are A. S. Smith, landlord, and William Larder, tenant, and the property is described as an upper maisonette known as No. 27A, Norfolk Square, Brighton. The terms of the agreement are one year from Mar. 25, 1915, and then on a quarterly tenancy (not to expire at the Christmas quarter), and the rent is stated to be £21 18s. 6d. per quarter.

The present contract having been entered into, the parties proceeded in the ordinary course. The purchaser investigated the title and finally a draft conveyance was prepared. That draft conveyance as originally drawn was, so far as is relevant to anything I have to decide, in these terms :

The vender as personal representative of the said Annie Spershott Smith, deed., hereby conveys unto the purchaser all that piece or parcel of land situate and being in the County Borough of Brighton and on the east side of Norfolk Square together with the messuage or dwelling-house erected thereon or on some part thereof and known as No. 27 Norfolk Square Brighton aforesaid as the same is for the purpose of identification only and not by way of limitation or extension of grant more particularly delineated and described in the plan drawn hereon and thereon coloured pink.

The plan referred to was, I am told, a tracing from the ordnance survey and contained the property proposed to be sold marked in red and pink. The vendor objected to that method of description, and in particular objected to the plan being annexed to the conveyance. He took the point that he could not, even although the plan was only for the purpose of identification and not by way of limitation or extension of grant, agree to the plan, unless he had it checked and verified by his own surveyor, which would put him to expense, and that he was not prepared to agree to have the plan at all unless the purchaser was willing to pay whatever expense might be incurred in employing his surveyor to check it. He suggested that the description of the property should be altered in this way : that the reference to the plan should be struck out, but that the description of the property should read as :

All that piece or parcel of land situate and being in the County Borough of Brighton bounded on the west by Norfolk Square, on the north by No. 28 Norfolk Square

on the east by No. 30 Norfolk Square and on the south by No. 26 Norfolk Square together with the messuage or dwelling-house erected thereon or on some part thereof and known as No. 27 Norfolk Square.

And he claimed that that was a sufficient description to identify beyond all reasonable doubt the property which was the subject matter of this contract. It appears from the copy of the plan which I have before me that the property in question is, with a forecourt in front and a small yard in the rear, a dwelling-house which is in Norfolk Square, Brighton.

In these circumstances, the parties being unable to come to an agreement in the matter, this summons was taken out for the purpose of having the question determined whether the vendor was entitled to say: "I refuse to have a plan unless the purchaser is willing to pay any additional cost which may be thrown upon me owing to the fact that there is a plan," and that is the first question which I have to determine. It seems to me, I am bound to say, something of a storm in a teacup. The whole matter of the plan, and getting someone to check it, seems to be a small matter, and one which might very easily have been dealt with by the parties without the necessity and expense of these proceedings. However, the applicant chose to take these proceedings and is entitled to have her legal rights decided.

The second question that is raised by the summons is of a different nature. It is said that by the contract the property is sold subject to and with the benefit of a tenancy agreement which is set out in the second schedule, that the tenancy agreement was produced to the purchaser or the purchaser's solicitors, but that when they sought for further information about the matter they were informed, on Apr. 14, 1936, as follows:

With regard to the tenancy of the upper maisonette known as No. 27A, Norfolk Square, the original tenant was a William Larder, who was a statutory tenant. We understand from our client that he subsequently died and the wife continued the tenancy in pursuance of her rights under the Rents, etc., Acts.

They pointed out that that was not accurate information at all, and that the vendor, having failed to provide any more satisfactory information he has failed to show a good title to the property. The applicant does not, and never has desired to put an end to the contract or to claim compensation under it, but I cannot help thinking that this second matter in the summons was brought in rather for the purpose of strengthening, if it did do so, the position of the applicant, because there is no real substance in it, as, in the events which have happened, the applicant's solicitors got in touch themselves with the lady who was in occupation of the property, and by an arrangement made between them with which the vendor had nothing to do, the lady agreed to give up the premises,

and the whole thing is really a pure technicality and nothing more. None the less the applicant is entitled to have the question decided.

Now the first point is this. Is the purchaser entitled to insist that the conveyance should be by way of plan, restricted no doubt in the way it is suggested, i.e., for the purpose of identification only and not by way of limitation or extension of grant, even though such a description of the property may involve some expenditure? It is said that, as a result of the decision of SWINFEN EADY, J., as he then was, in *Re Sansom & Narbeth's Contract* (1), in all simple cases a purchaser—I think it is put as high as this—is entitled to have the land conveyed to him by reference to a plan on the conveyance, as is stated in the headnote. But in my judgment the headnote, as set out in the report, is not an accurate description of the effect of the judgment of SWINFEN EADY, J. When that learned judge, at the end of his judgment summed up the conclusion to which he came, he said this :

It will be sufficient for the determination of the present case to hold that in this case and in ordinary simple cases the purchaser, as part of the rule that he is entitled to take the conveyance in his own form, is entitled to have a plan upon the conveyance, and is entitled to a conveyance by reference to that plan. . . . It follows . . . in this case the purchaser is right, and the costs will follow the event.

But in my judgment the learned judge did not say that, even in a simple case, a purchaser, whatever the expense in which the vendor might be involved, was always entitled as of right to a plan. In my judgment, having regard to the decision of SWINFEN EADY, J., and the earlier decision of FARWELL, J., which is reported in *Re Sparrow & James' Contract* (2), the true effect of this decision and the law as it is to-day is really stated correctly in WILLIAMS ON VENDOR AND PURCHASER, 4th Edn., at p. 651, where the learned editors say this :

With respect to the parcels or description of the property sold, the purchaser is entitled to have inserted in the conveyance such a description of the property sold as will clearly identify the land intended to be assured. If, therefore, the description of the property sold contained in the contract is misleading, inadequate or obsolete, the purchaser should insert in the draft conveyance an accurate description of the land, according to its present condition, prepared from his own surveyor's report; and it is thought that in these circumstances the vendor could not refuse to convey the land by the new description.

And then at pp. 652 and 653 they say this :

The important question, in what cases is the purchaser entitled to have the property conveyed by reference to a plan, can only rightly be solved by applying these principles.

Then they refer to the decisions of FARWELL, J., and SWINFEN EADY, J., to which I have referred and end up by saying :

It is respectfully submitted that this pronouncement [i.e., the pronouncement of SWINFEN EADY, J.] is unsatisfactory in principle; and that a sounder rule is

suggested in the judgment of FARWELL, J., viz., that, where the description in the contract is without a plan insufficient to identify the property sold, the purchaser may require it to be supplemented by a plan. It seems to be implied from this that no plan can be required where the description in the contract affords a sufficient and satisfactory identification of the land sold.

! In my judgment, except that I think the learned editors of this book treat the decision of SWINFEN EADY, J., as going further than I think he intended it to go, the statement which I have read is a correct statement of the law. The duty of the vendor is to convey under a description which is a sufficient and satisfactory identification of the land sold. No doubt in many cases the most satisfactory and sufficient method of doing that is by means of a plan, and if, in order that there shall be a sufficient and satisfactory identification of the land sold, a plan is necessary, then beyond all doubt, in my view, the vendor is bound to convey the land subject to a plan. But in my judgment if it is possible to convey the property by a sufficient and satisfactory identification without a plan, and if the use of a plan throws upon the vendor an expense which is not necessary because the plan itself is not necessary, then in my judgment it is not right to say that the purchaser can insist on the vendor going to that additional and unnecessary expense. And in my judgment SWINFEN EADY, J., did not mean, in the case to which I have referred, any more than this, that in most simple cases the best method of conveying property for the purpose of giving a sufficient and satisfactory identification, is by means of a plan, and therefore, as a general rule, a plan is necessary. But in my judgment the learned judge did not intend to go beyond what is, as I understand it, quite well settled now to be the duty of the vendor, namely to convey by a sufficient and satisfactory identification, and if he can do that then he has done all that he is called upon to do. If, being able to do that without the use of a plan, the purchaser insists upon a plan, then in my view the plan can only be provided at the expense of the purchaser, and the vendor is not in my judgment bound to go to the extra expense of the plan unless it is necessary to comply with the duty which rests upon him.

If that be the true view I have now to consider if this is a case in which a plan is necessary for the purpose of identifying and properly describing the property sold. This property is a house with a forecourt and a small yard in the rear, which is one of a row of houses in a street in Brighton, and in my judgment there can really be no question at all but that the description which the vendor proposes should be inserted in the conveyance—that is:

All that piece or parcel of land situate and being in the County Borough of Brighton bounded on the west by Norfolk Square, on the north by No. 28 Norfolk Square on the east by No. 30 Norfolk Square, and on the south by No. 26 Norfolk

Square together with the messuage or dwelling-house erected thereon or on some part thereof and known as No. 27 Norfolk Square—

is a perfectly ample and sufficient description, identifying the property, and that no plan is a necessary part of such identification. If that be so, and if I have rightly stated the law, it follows that the purchaser was not in this case entitled to require the vendor to agree to have a plan, because the vendor could not, I think, be expected to agree to a plan which he had not had checked and verified by his own surveyor, and that would necessarily involve him in some expense which, in the view I take of this case, is an expense he is not bound to incur. In these circumstances, and so far as relief is sought by the summons on the first question, I think the applicant is wrong and is not entitled to the relief which she seeks.

With regard to the second question I think technically the applicant is right. Technically the vendor has not, I think, fulfilled the duty which rested upon him of giving all proper information to the purchaser as to the terms upon which this part of the property was held. It appears that there was no actual agreement in force. The lady in occupation was not a statutory tenant at all. She was, I suppose, holding over in some way, and I think the vendor was bound, in compliance with his duty, to give fuller information than he was prepared to give. But in fact there is no real substance in this point, as I have pointed out, and, as I said before, I cannot help thinking that it was dragged into this summons by way of makeweight and without any particular need to have the question determined. But the question has been raised and as I say technically I think the vendor has fallen short in regard to the duty which rested on him. But I do not propose to make any declaration upon the second question. I propose to dismiss the summons and I think on the whole that justice will be done if I make no order as to costs.

Solicitors : *Blyth, Dutton, Hartley & Blyth*, agents for *Graham-Hooper & Betteridge*, Brighton (for the applicant); *Boxall & Boxall*, agents for *Edwin Boxall & Kempe*, Brighton (for the respondent).

[Reported by C. M. YOUNG, Barrister-at-Law.]

Re WATT'S WILL TRUSTS, WATT v. WATT.

[CHANCERY DIVISION (Bennett, J.), **March 27, April 7, 21, 22, July 31, 1936.**]

Perpetuities—Accumulations—Statutory periods—Accumulation during minorities—Excessive accumulation—Law of Property Act, 1925 (c. 20), s. 164. Wills—Class gift—Attainment of specified age—Period of distribution—Payment of income to beneficiary over twenty-one—Trustee Act, 1925 (c. 19), s. 31 (1) (ii).

A testator by his will directed that the share of his son G. in the testator's trust estate (called the G. fund), should be held by special trustees upon trust that, subject to certain provisions for the maintenance of G. and his children and the payment of annuities to G. and his wife, "the special trustees shall during the minority of the children or child of G. accumulate the surplus (if any) of the income of the G. fund . . . for the benefit of the persons who shall eventually become entitled to the capital of such fund." The will further provided: "Subject as aforesaid the special trustees shall stand possessed of the capital and income of the G. fund and of the said accumulations in trust for all or any of the children or child of G., who being male, attain the age of twenty-one years, or being female attain that age or marry, and if more than one in equal shares." The testator died in Oct., 1928, and was survived by G., G.'s wife and three children of G., who were born respectively in 1914, 1917 and Jan., 1928. When G.'s eldest child attained the age of twenty-one a summons was taken out to determine: (i) whether the direction for accumulation was valid; (ii) whether G.'s eldest son became indefeasibly entitled in possession upon attaining the age of twenty-one to one equal third part of the G. fund and the accumulations of the income of such fund, subject to and after the appropriation of a sufficient sum to provide for the annuities to and maintenance of G. and his wife and children, or whether any child of G., who may hereafter be born and attain the age of twenty-one would be entitled to participate in the distribution of the G. fund and the accumulations, and (iii) if G.'s eldest child did not upon attaining the age of twenty-one become indefeasibly entitled in possession to one equal third part of the G. fund, subject as aforesaid, whether under the Trustee Act, 1925, s. 31 (1) (ii), G.'s eldest child on attaining the age of twenty-one became entitled to be paid the income of his expectant share of the G. fund and the accumulations of the income thereof, and if so during what period:—

HELD: (i) the direction for accumulation was valid and effectual so long as any child of G. living at the date of the testator's death was under the age of twenty-one.

(ii) G.'s eldest child did not become indefeasibly entitled in possession to one equal third part of the G. fund and any child of G. born whilst any child of G. living at the death of the testator was alive and under the age of twenty-one would if he or she attained the age of twenty-one, be entitled to participate in the distribution of the G. fund and the accumulations.

(iii) G.'s eldest child did not on attaining twenty-one become entitled to be paid the income of his expectant share of the G. fund and the accumulations.

[EDITORIAL NOTE.] The three questions raised by this originating summons were all of special interest when the case was heard, but the last has been settled by the recent decision of the Court of Appeal in *Re Turner's Will Trusts* (5) and that decision is here followed. The main interest has, therefore, shifted to the

first question, which is concerned with the choice of the periods laid down by the Law of Property Act, 1925, s. 164, within which accumulations are allowed by law. The matter here dealt with is accumulations during minorities, and the testator having selected a period too wide to be enforced the accumulations are restricted to the third period set out in the section. The other question of the application of the rule in *Andrews v. Partington* (3) was covered by authority and the case is shown to be an exception to that rule.

AS TO ACCUMULATIONS DURING MINORITIES, see HALSBURY, 1st Edn., Vol. 22, Perpetuities, pp. 371, 372, paras. 755, 756; and FOR CASES, see DIGEST, Vol. 37, pp. 136, 137, Nos. 642-657, and pp. 143-146, Nos. 696-718.]

Cases referred to :

- (1) *Re Cattell, Cattell v. Cattell, Re Cattell, Cattell v. Dodd*, [1914] 1 Ch. 177; 37 Digest 136, 648.
- (2) *Jagger v. Jagger* (1883), 25 Ch. D. 729; 37 Digest 131, 615.
- (3) *Andrews v. Partington* (1791), 3 Bro. C.C. 401; 44 Digest 768, 6266.
- (4) *Re Stephens, Kilby v. Betts*, [1904] 1 Ch. 322; 37 Digest 140, 679.
- (5) *Re Turner's Will Trusts, District Bank, Ltd. v. Turner*, [1936] 2 All E.R. 1435; Digest Supp.
- (6) *Griffiths v. Vere* (1803), 9 Ves. 127; 37 Digest 144, 706.
- (7) *Re Errington, Errington-Turbutt v. Errington* (1897), 76 L.T. 616; 37 Digest 136, 644.
- (8) *Iredell v. Iredell* (1858), 25 Beav. 485; 44 Digest 772, 6300.
- (9) *Watson v. Young* (1885), 28 Ch. D. 436; 37 Digest 104, 388.
- (10) *Re Deloitte, Griffiths v. Allbeury*, [1919] 1 Ch. 209; 44 Digest 772, 6303.

ADJOURNED SUMMONS taken out by the special trustees of a fund settled by his will by Andrew Alexander Watt, who died on Oct. 11, 1928, on his son Gerald Allingham Watt and known as the Gerald Watt fund. The testator made his will on May 18, 1927 and the relevant portions of it are set out in the judgment at pp. 1158-1160 *post*.

Gerald Allingham Watt, at the date of the summons herein, had three children by his wife Gladys Kathleen Watt, the eldest of whom, the defendant Kenneth Rupert Watt, attained the age of twenty-one on Sept. 12, 1935, and one of the questions to be determined was whether, in those circumstances, the rule in *Andrews v. Partington* (3) applied so as to close the class of persons entitled to the benefit of the Gerald Watt fund, and to make the defendant Kenneth Rupert Watt indefeasibly entitled in possession to one equal third part of the investments and property constituting or representing the Gerald Watt fund and the accumulations of income thereof subject to the appropriations directed by the will of the testator to be made thereout. In the event of his not being so entitled the summons as amended asked whether under the Trustee Act, 1925, s. 31 (1) (ii) the said defendant became entitled to be paid the income of his expectant share of the Gerald Watt fund and the accumulations of the income thereof and if so during what period. In addition to the above questions the summons raised by question 1 thereof the question of the validity of the direction to accumulate contained in clause 23 of the said will.

A. F. Topham, K.C., and *P. M. Walters*, for the plaintiffs, the special trustees of the Gerald Watt fund, who argued on behalf of the unborn children of Gerald Allingham Watt: A direction to accumulate for a period beyond that allowed by law is not altogether void, but is void only as far as it exceeds one of the periods allowed: see *Griffiths v. Vere* (6) at p. 130. Under the Law of Property Act, 1925, s. 164 (1) there are four periods during which accumulations are allowed, and it is necessary to select the one which most nearly fits in with the intentions of the testator: see *Jagger v. Jagger* (2) and *Re Errington, Errington-Turbutt v. Errington* (7). In this case the choice must be between periods (b) and (c) of sect. 164 (1) and the one which best fits the words of the will is (c). From that it follows that the rule in *Andrews v. Partington* (3) will not apply since, where there is a valid direction to accumulate the ascertainment of the class entitled to the benefit of the fund is postponed: see *Re Stephens, Kilby v. Betts* (4).

BENNETT, J.: With the result in this case that the class will not be closed until the youngest of the children of Gerald in existence at the death of the testator attains twenty-one.

P. M. Walters: No, because in this will there are several indications that the fund was not to be distributed until after the death of Gerald. Although a life interest is not given to him the provisions as to maintenance in clauses 21 and 22 are to continue during the life of any child whenever born, and whether the accumulations clause is void or not it may be looked at to discover the intention of the testator, and its wording makes it clear that that intention was, that during the time that any child of Gerald is an infant, the fund should be accumulated, with the result that the class to share in the fund can be ascertained only at his death: see *Iredell v. Iredell* (8) and *Watson v. Young* (9), at p. 445.

R. F. Roxburgh, K.C., and *J. S. Bennett*, for the defendant Kenneth Rupert Watt: *Re Deloitte, Griffiths v. Allbeury* (10) really decides this case. It shows that there is an intermediate alternative between the strict application of the rule and its rejection when there is a period when accumulations either are intended to or do stop.

Although from clause 16 of the will it might appear that the fund was to be considered as a whole and entire fund, the provisions requiring the appropriation of part of it to satisfy the annuities shows that that cannot be so. The children could not claim to be maintained out of any portion so appropriated. You cannot construe the accumulations clause until you have decided when the class is to close. As the direction to accumulate is not in accordance with any of the periods mentioned in sect. 164 of the Act the whole thing must be rejected. The alternative is to rewrite the accumulations clause so as to make it fit period (d) which is the one which approximates most closely to the intention of the will

as a whole. As to the meaning of this period see *Re Cattell*, *Cattell v. Cattell*, *Re Cattell*, *Cattell v. Dodd* (1).

Wilfrid M. Hunt, for the defendants Francis Andrew Patrick Watt and Harold Richard Watt, the infant children of Gerald Allingham Watt and Gladys Kathleen Watt: My interests are identical with those of the first defendant.

H. B. Vaisey, K.C., and *J. H. C. Morris*, for the defendants Gerald Allingham Watt and Gladys Kathleen Watt: There is a clear indication in the will that the Gerald Watt fund was contemplated as a whole and entire fund and that means a postponement of its distribution. The provisions as to maintenance in clauses 21 and 22 are to continue during the minority of any child of Gerald and that means that the date of the closing of the class cannot be ascertained until the death of Gerald. There is, therefore, sufficient to exclude the rule in *Andrews v. Partington* (3) which as BUCKLEY, J., said in *Re Stephens* (4) must only be applied in cases of necessity.

BENNETT, J.: The questions raised by this originating summons arise out of the dispositions made in his will by the late Andrew Alexander Watt of a share of his residuary estate for the benefit of his son Gerald Allingham Watt and his said son's wife and children. The will is dated May 18, 1927. The testator died on Oct. 11, 1928, and his will was proved in the principal registry on Nov. 8, 1928. By clause 8 of his will, after bequeathing certain specific and general legacies, the testator gave, devised and bequeathed to his trustees all his real estate and the residue of his personal estate upon the trusts and for the purposes thereafter declared and mentioned, and the testator declared that Form 8 contained in Part II of the Statutory Will Forms, 1925, was incorporated in his will and should apply to all property passing under that clause subject to any modifications imposed or implied by all or any provisions included in his will. By clause 9 the testator directed that his trustees should stand possessed of his trust estate leaving the balance of his real and personal estate after making the payments thereout authorised by the administration trusts aforesaid upon trust for his child if only one or all his children if more than one who should be living at his decease, and if more than one as tenants in common but not in equal shares, it being his intention that a share of a son should be double that of a daughter, and the clause contained a substitutional gift in favour of the issue of a child of the testator who should have died in his lifetime. Clauses 10, 11, 12, 13, 14 and 15 are not material for the purposes of this summons. By clause 16 the testator declared that the share of and in his trust estate directed by clause 9 thereof to be held in trust for his son the defendant Gerald Allingham Watt or his issue and any additions that might accrue thereto under any provision of his will (all of which

were thereafter and are hereinafter called "the Gerald Watt fund") should not vest absolutely in him or them but should be paid or transferred by his trustees to the plaintiffs and the said Robert Pulsford Hart (since deceased) (who and the survivors and survivor of whom were thereafter and are hereinafter referred to as "the special trustees") to be held by them upon the trusts and with and subject to the powers and provisions thereafter declared concerning the same. By clause 17 the special trustees were directed in the first place during the life of the defendant Gerald Allingham Watt or during such periods either continuous or discontinuous as he should in the opinion of the special trustees be unfit to manage his own affairs to apply a competent part not exceeding the sum of £1,500 per annum of the income of the Gerald Watt fund for or towards the maintenance and personal support or benefit of the defendant Gerald Allingham Watt and otherwise in the manner therein mentioned. By clause 18 the testator directed that if at his death no act or event should have been done or happened whereby the annuity thereby given to the defendant Gerald Allingham Watt or some part thereof would if belonging to him absolutely have become vested in or charged in favour of some other person or persons or a corporation or whereby he would be deprived of the right to receive the same or any part thereof for his own benefit then during such periods either continuous or discontinuous as he should in the opinion of the special trustees be fit to manage his own affairs the special trustees should in lieu of and in substitution for the provision in favour of the defendant Gerald Allingham Watt contained in clause 17 pay out of the income of the Gerald Watt fund an annuity at the rate of £1,000 per annum to the defendant Gerald Allingham Watt during his life or until some act or event as aforesaid should be done or happen. By clause 19 the testator directed that during the parts (if any) of the life of the defendant Gerald Allingham Watt during which notwithstanding that he should be so fit to manage his own affairs as mentioned in clause 18 he should not be entitled to receive the said annuity the special trustees should provide for his maintenance and personal support or benefit out of the income of the Gerald Watt fund in the same manner and to the said extent as was by clause 17 provided for the period during which he should be unfit to manage his own affairs and notwithstanding that he should not be so unfit.

By clause 20 the testator directed that the special trustees should in the next place out of the income of the Gerald Watt fund pay to the defendant Gladys Kathleen Watt during her life so long as she should remain the wife or widow of the defendant Gerald Allingham Watt an annuity of £1,000 per annum and in the event of her marrying again after his death an annuity of £500 per annum during her life such respective annuities to be for her separate use without power of anticipation.

By clause 21 the testator directed that the special trustees should in the next place during the minority of the children of the defendant Gerald Allingham Watt by the defendant Gladys Kathleen Watt or of any one of them at their discretion apply a competent part of the income of the Gerald Watt fund for or towards the maintenance education, advancement in life or benefit of such children or child, and might either themselves so apply the same or might pay the same to the defendant Gladys Kathleen Watt or any other person or persons for the purpose aforesaid. By clause 22 the testator directed that the special trustees should in the next place during such periods either continuous or discontinuous as they in their absolute and uncontrolled discretion might decide pay or apply such further sum or sums not exceeding in any one year the sum of £2,000 out of the income of the Gerald Watt fund for the maintenance, advancement, benefit or advantage or for any other the purposes whatsoever of the defendants Gerald Allingham Watt or Gladys Kathleen Watt or their child or children or any of them to the exclusion of the others or other of them as the special trustees might, whether as to the amount or purpose of any such payment or application, in their absolute and uncontrolled discretion think fit.

Clause 23 was as follows :

The special trustees shall during the minority of the children or child of the said Gerald Allingham Watt accumulate the surplus (if any) of the income of the Gerald Watt fund at compound interest by investing the same and the resulting income thereof in any of the investments hereinafter authorised for the benefit of the person or persons who shall eventually become entitled to the capital of such fund but with power to apply the accumulations of any preceding year or years in or towards any of the purposes to which such accumulations might have been applied had they been income of the Gerald Watt fund in the then current year.

Clause 24 was as follows :

Subject as aforesaid the special trustees shall stand possessed of the capital and income of the Gerald Watt fund and of the said accumulations in trust for all or any the children or child of the said Gerald Allingham Watt who being male attain the age of twenty-one years or being female attain that age or marry and if more than one in equal shares.

The plaintiffs are the special trustees of the Gerald Watt fund, and that fund has been transferred to them. Gerald Allingham Watt has had three children by his present wife, the defendant Gladys Kathleen Watt. They are the defendant Kenneth Rupert Watt, who was born on Sept. 12, 1914, who attained twenty-one on Sept. 12, 1935, and who is therefore absolutely entitled to a share of the Gerald Watt fund, the defendant Francis Andrew Patrick Watt, who was born on Nov. 21, 1917, and is now in his nineteenth year, and the defendant Harold Richard Watt, who was born on Jan. 13, 1928, and is now in his ninth year. The special trustees have in each year paid to or applied for the benefit of the

defendant Gerald Allingham Watt a sum or sums not exceeding £1,500 per annum in accordance with the provisions of clause 17 of the will, and after payment of the outgoings in respect of a freehold house and premises known as Drumlerry Shantallow, the annuity of £1,000 per annum to the defendant Gladys Kathleen Watt, the maintenance provided for the infant children of the defendant Gerald Allingham Watt by clause 21, and the special maintenance of a sum or sums not exceeding in any one year the sum of £2,000 provided for by clause 22, the special trustees have accumulated the balance of the income of the Gerald Watt fund. The investments representing such accumulations are of the approximate value of £36,000. The Gerald Watt fund, exclusive of the said accumulations of income, is now of the value of upwards of £308,000. The amount required to answer the said annual sums hereinbefore referred to will not exceed £120,000.

On these facts and a will in the terms I have stated, the first question asked by the amended originating summons is as follows :

Whether upon the true construction of clause 23 of the said will the direction therein contained for the accumulation by the said special trustees during the minority of the children or child of the defendant Gerald Allingham Watt of the surplus income of the said Gerald Watt fund for the benefit of the person or persons who should eventually become entitled to the capital of such fund with power to apply the accumulations of any preceding year or years in or towards any of the purposes to which such accumulations might have been applied had they been income of the Gerald Watt fund in the then current year constituted a valid and effectual trust to accumulate such surplus income and if so for what period or periods.

The direction to accumulate is a direction to accumulate the income of the whole of the Gerald Watt fund, except such part as may be required to provide for the annual payments that have to be made to or for the benefit of Gerald and his present wife and their children. The period for which accumulation is directed is during the minority of the children or child of Gerald. The children are not in terms confined to those living at the testator's death. The period in terms extends to the minority of any children of Gerald who may hereafter be born. Testators are not free to direct the accumulation of the income of property of which they die possessed for any period of time that to them may seem desirable. Their freedom in this respect is restricted by the provisions of the Law of Property Act, 1925, s. 164. Subsect. (1) of that section reads as follows :

No person may by any instrument or otherwise settle or dispose of any property in such manner that the income thereof shall, save as hereinafter mentioned, be wholly or partially accumulated for any longer period than one of the following, namely : (a) the life of the grantor or settlor ; or (b) a term of twenty-one years from the death of the grantor, settlor or testator ; or (c) the duration of the minority or respective minorities of any person or persons living or *en ventre sa mere* at the death of the grantor, settlor or testator ; or (d) the duration of the minority or

respective minorities only of any person or persons who under the limitations of the instrument directing the accumulations would, for the time being, if of full age, be entitled to the income directed to be accumulated. In every case where any accumulation is directed otherwise than as aforesaid, the direction shall (save as hereinafter mentioned) be void; and the income of the property directed to be accumulated shall, so long as the same is directed to be accumulated contrary to this section, go to and be received by the person or persons who would have been entitled thereto if such accumulation had not been directed.

It is not necessary to read subsect. (2) of that section, which excepts from the operation of subsect. (1) accumulation for certain specific purposes. In the present case it has not been argued that the accumulation directed to be made by the will now being considered was directed to be made for an excepted purpose. It is settled that a testator may select only one of the four periods specified in sect. 164 (see LORD PARKER OF WADDINGTON in *Re Cattell* (1)), and when a question is raised whether or not the section has been breached the court has first to determine which of the four periods the testator has seemingly selected, determining that question by reference to the language employed and the facts of the case : *Jagger v. Jagger* (2). In the present will the choice is between the third period and the fourth. The first period is out of the case, and as regards the second the testator has not had in mind a period of years, but a period of time to be measured by the minority of children. In my judgment, the period which best fits with the language of the will and the facts of the case is the third. I reject the fourth for the reason that that period is the minority or the respective minorities of a person or of persons who, if of full age, would be entitled to the income directed to be accumulated. Under the testator's will the income of the whole fund is directed to be accumulated after some of those who may share in it have attained their majority. If the third period is, as I hold it is, the period the testator has selected, it is clear, in my judgment, that the section has been breached, for accumulation is not directed to be made during the minority of any child of Gerald living at the death of the testator. In terms the clause directs accumulation during the minority of any child of Gerald whenever born. Where the section has been breached the law is not that the direction is wholly void, but that there must be a curtailment of the period laid down by the testator to that one of the statutory periods which has to be applied. The answer to the first question asked by the amended originating summons is, in my judgment, that the direction to accumulate contained in clause 23 of the testator's will is valid and effectual so long as any child of Gerald living at the date of the testator's death is under the age of twenty-one years.

The second question asked by the originating summons is :

Whether upon the true construction of the said will the defendant Kenneth Rupert Watt as the eldest of the three children of the marriage of the defendants

Gerald Allingham Watt and Gladys Kathleen Watt became indefeasibly entitled in possession upon attaining the age of twenty-one years on Sept. 12, 1935, to one equal third part of the investments and property constituting or representing the Gerald Watt fund settled by the will of the said testator and the accumulations of the income of such fund subject to and after appropriation out of such trust funds and property other than those representing accumulations of income of a sufficient sum to provide by the income thereof for the annual sums payable out of the income of the Gerald Watt fund, namely : (i) the outgoings payable under clause 15 of the will in respect of the said freehold house known as Drumlerry Shantallow aforesaid. (ii) the annual sum payable under clause 17 or the annuity payable under clause 18 or the annual sum payable under clause 19 as the case may be ; (iii) the annuity payable under clause 20 and (iv) the annual sum or sums payable under clause 22 ; or whether any child of the defendant Gerald Allingham Watt who may hereafter be born and attain the age of twenty-one years will be entitled to participate in the distribution of the Gerald Watt fund and the accumulations of income thereof.

The point to be decided is whether the will is one to which the rule in *Andrews v. Partington* (3) applies so that when any child of Gerald has attained twenty-one the class of his children to share in the Gerald Watt fund is closed and any child who may thereafter be born is excluded from taking a share in the fund. In my judgment, the answer is that the class is not closed, but will remain open until the direction to accumulate ceases to be operative, that is to say, until there is no longer any child of Gerald living at the testator's death under the age of twenty-one. Then, and not till then, in my judgment, does the class close. I found my judgment in this respect on the judgment of BUCKLEY, J., in *Re Stephens, Kilby v. Betts* (4). At p. 328, BUCKLEY, J., is reported as having said this :

directly you find, as you do find in this case, that there is a direction to accumulate after the date at which the eldest child attains twenty-one—that is to say, where the fund to be divided is a fund to be aggregated and accumulated after that date, so that the divisible fund is not known at that date—you are driven to the conclusion that the child who first attains twenty-one cannot have that which is apparently given to him at that date, because the sum to be divided is not then known. Therefore, where you find a direction to accumulate to a later date, the rule in *Andrews v. Partington* (3) does not apply.

The decision governs the present case, and, following it, I answer the second question by saying that the defendant, Kenneth Rupert Watt, did not become indefeasibly entitled in possession to one equal third part of the Gerald Watt fund and that any child of the defendant, Gerald Allingham Watt, born whilst any child of Gerald living at the death of the testator is alive and under the age of twenty-one will, if he or she attain the age of twenty-one, be entitled to participate in the distribution of the Gerald Watt fund and the accumulation of income thereof.

The last question asked by the originating summons is this :

If upon the true construction of the said will the defendant Kenneth Rupert

Watt did not upon attaining the age of twenty-one years become indefeasibly entitled in possession to one equal third part of the investments and property constituting or representing the Gerald Watt fund and the accumulations of the income of such fund subject as in para. 2 mentioned whether under the Trustee Act, 1925, s. 31 (1) (ii), the defendant Kenneth Rupert Watt on attaining the age of twenty-one years became entitled to be paid the income of his expectant share of the Gerald Watt fund and the accumulations of the income thereof and if so during what period.

The point raised by this question was about to be considered by the Court of Appeal when the summons was before me for argument, and I reserved my judgment pending the decision of the Court of Appeal. Yesterday the Court of Appeal gave their decision in the case of *Re Turner's Will Trusts, District Bank, Ltd. v. Turner* (5), and following that decision the answer to the third question is that the defendant, Kenneth Rupert Watt, did not, on attaining twenty-one, become entitled to be paid the income of his expectant share of the Gerald Watt fund and the accumulation of income thereof.

The costs of all parties of this originating summons will be taxed as between solicitor and client and paid and retained by the plaintiffs out of the accumulation of the income of the Gerald Watt fund. That covers everything.

Solicitors : *Burton, Yeates & Hart* (for all parties).

[Reported by C. M. YOUNG, Barrister-at-Law.]

IZZARD v. UNIVERSAL INSURANCE COMPANY, LTD.

[COURT OF APPEAL (Greer, Slessor and Scott, L.J.J.), July 28, 29, 30, 1936.]

Insurance—Third party risks—Passenger carried by reason of or in pursuance of a contract of employment—Road Traffic Act, 1930 (c. 43), s. 36 (1) (b) (ii).

The assured owned a motor lorry in respect of which he was covered for commercial and not for passenger risks. The third party provisions indemnified him in respect of the death of any person arising out of the use of the lorry except of a person in the employment of the assured whose death arose out of or in the course of that employment, and of a person who was being carried in the vehicle at the time of the accident. This second proviso, following the Road Traffic Act, 1930, s. 36, was itself subject to an exception that the company was liable in respect of the death of a passenger carried "by reason of or in pursuance of a contract of employment." The assured undertook work for a building firm which employed workmen at a long distance from their homes. An agreement was made that the lorry should run on Saturdays to the town where the workmen lived and return on Mondays, and that workmen should be allowed to ride in it if they wished to go home, and that the assured should be paid for every journey whether workmen were carried or not. On one of these journeys the lorry was wrecked and a workman was killed. His widow was awarded damages against the assured, who was afterwards adjudicated bankrupt. She claimed against the insurance company under the Third Parties (Rights against Insurers) Act, 1930, and the arbitrator awarded her the amount of the judgment. His finding was upheld upon a special case by the judge, and the insurance company appealed:—

HELD (GREER, L.J., dissenting): (i) the words "contract of employment" mean a contract to which the assured is a party.

(ii) the use of the lorry to carry workmen to and from their homes came within the warranty of use for "general haulage and other trades."

Per SCOTT, L.J.: the policy did not cover passenger risks except in the events expressly contemplated in its third party provisions, and the workman's death did not in fact come within any of these provisions.

[EDITORIAL NOTE. The court have here reversed by a majority the decision of MACKINNON, J., in this case and it is now held that the words "by reason of a contract of employment" in proviso (ii) to Road Traffic Act, 1930, s. 36 (1) (b), mean a contract to which the insured is a party.

FOR THE ROAD TRAFFIC ACT, 1930, s. 36, see HALSBURY, Hailsham Edn., Vol. 18, p. 561, para. 909; and FOR THE SECTION ITSELF, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 23, p. 637.]

Cases referred to:

- (1) *St. Helens Colliery Co., Ltd. v. Hewitson*, [1924] A.C. 59; 34 Digest 280, 2364.
- (2) *Taylor v. McAlpine & Sons & Southern Ry. Co.* (1924), 17 B.W.C.C. 26; 34 Digest 281, 2365.
- (3) *Provincial Insurance Co. v. Morgan & Foxon*, [1932] 2 K.B. 70; [1933] A.C. 240; Digest Supp.
- (4) *Roberts v. Anglo-Saxon Insurance Assocn.* (1927), 96 L.J. K.B. 590; Digest Supp.
- (5) *Passmore v. Vulcan Boiler & General Insurance Co.* (1936), 54 Ll. L.R.; Digest Supp.

APPEAL from a judgment of MACKINNON, J. (reported [1936] 1 All E.R. 738), on a special case stated by J. D. Cassels, K.C., acting as

arbitrator, in favour of the claimant widow against the defendant insurance company.

The claimant was the widow of a workman named Izzard. One William Druce, a contractor, owned a Fordson lorry, and on Nov. 16, 1933, he was granted a policy of insurance in respect of this vehicle by the defendant company. The policy was in a usual form : it was headed "Commercial motor vehicle policy," and in the schedule the assured set out his business or occupation as "Haulage contractor, dairyman, sand and gravel merchant, coal merchant and farmer." The vehicle was described, and opposite the printed words "Warranted used only for" was written "General haulage and other trades." The company undertook, under the section-heading "II, Liability to third parties," to indemnify the assured against liability at law for compensation and claimants' cost and expenses in respect of :

Death of or bodily injury to any person caused by or arising out of the use of any vehicle described in the schedule hereto. . . . Provided always that the company shall not be liable in respect of : . . . (b) Death of or bodily injury to any person in the employment of the insured arising out of and in the course of such employment ; (c) Death of or bodily injury to any person (other than a passenger carried by reason of or in pursuance of a contract of employment) being carried in or upon or entering or getting on to or alighting from such vehicle at the time of the occurrence of the event out of which any claim arises.

The policy complied with the requirements of the Road Traffic Act, 1930, s. 36 (1) (b) (ii) and the proviso repeated the wording of the statute, which is set out in the judgment.

In his proposal form the assured, in answering the question : "Is passenger risk to be covered ?" had answered "No." Under the general exceptions the policy set out that the company should not be liable in respect of any accident, etc., while the vehicle was :

being used otherwise than for the purposes mentioned in the schedule hereto . . . or is being used for hire or reward ; or in respect of any contractual liabilities.

The assured, Druce, entered into a contract with a company known as Industrial Builders, Ltd., to do haulage work for them, and used the truck on that work first in Didcot, Berks, and later in Coventry. The company offered its workmen the facility, if they cared to use it, of being conveyed back to Didcot from Coventry at the week-end, and arranged with Druce that his truck should be available for such workmen as wished to travel in it on that journey. The company agreed to pay Druce 35s. for each journey whether workmen were carried or not. On July 21, 1934, the truck met with an accident and a number of workmen, including Izzard, were killed. Mrs. Izzard, the widow, respondent to the appeal, brought an action against Druce under the Fatal Accidents Acts, 1846-1908, and on Jan. 18, 1935, she was awarded £850 damages

and costs. On Feb. 19, 1935, Druce was adjudicated bankrupt. By the Third Parties (Rights against Insurers) Act, 1930, s. 1, the rights of Druce against the insurance company became vested in Mrs. Izzard. The insurance company denied liability under the policy. The contentions of the parties and the judgment of MacKINNON, J., are set out in [1936] 1 All E.R., pp. 739-742.

The insurance company appealed.

A. T. Miller, K.C., Tristram Beresford, K.C., and C. N. Shawcross for the appellant company.

H. D. Samuels, K.C., and Frank Soskice for the respondent widow.

Miller, K.C. : If passenger risk had been covered, the premium would have been higher. The key to the meaning of the words in proviso (ii) is to be found in *St. Helens Colliery v. Hewitson* (1). In that case a workman employed at a colliery was injured in an accident while he was travelling in a special collier's train from his work to his home. By an agreement between the colliery company and the railway company, the railway company agreed to provide special trains for conveyance of the colliers to and from their work and the colliery company agreed to indemnify the railway company against claims made by the workmen in respect of accidents incurred while they were using the train. Any workman who desired to travel by these trains signed an agreement with the railway company releasing them from all claims, and the colliery company then provided him with a pass and charged him a sum less than the agreed fare, which was deducted from his wages. The House of Lords held by a majority of four to five that, as there had been no obligation on the workman to use the train, the injury did not arise in the course of the employment within the meaning of the Workmen's Compensation Acts. Parliament therefore passed this subsection in order to bring such men within the policy. The intention of the legislature was to exclude liability for men who were protected by the Workmen's Compensation Act, but to include liability in respect of men who were shut out from its protection by the decision of the *Hewitson* case (1). This decision was followed by the Court of Appeal in *Taylor v. McAlpine & Sons* (2), where a workman was injured in a train which he was not obliged to take but which was the only means of transport ordinarily available between his home and his work, and it was held that the accident did not arise out of and in the course of his employment. To read these words as meaning any contract of employment between the injured man and a third party, and as covering injury to any man who happened to be a servant of a third party even if he were already protected by the Workmen's Compensation Acts, is to make them ridiculous. The words are only reasonable if they are taken to mean "carried by the assured in pursuance of a contract of employment with him."

The learned judge is wrong where he says that the company had to issue a policy complying with the requirements of the Road Traffic Act. He assumed erroneously that, because the law laid down that the policy should contain certain cover and that the cover must include passenger risks of third persons, therefore the insurance company must have been issuing a policy which covered that risk.

SLESSER, L.J. : The test of mischief must be considered. I find it difficult to see why an exception should be made in favour of the workmen of a third person.

Miller, K.C. : The learned judge, in drawing this erroneous inference, overrode the contractual terms of the policy and applied it to a risk which was clearly outside the ambit of the cover given. The breach of a statute does not prove the presence of a term in the contract. A warranty such as that given by the assured clearly prevents the cover from operating during a series of events which it contemplates shall not occur. In *Roberts v. Anglo-Saxon Insurance Association, Ltd.* (4), a motor car was warranted to be used only for commercial travelling, and the point was taken that if the assured at any time used it for any other purpose he avoided the policy ; the court held that the statement limiting the use was descriptive of the risk and that the car was not covered when it was being used to carry passengers. This lorry was warranted to be used only for general haulage and other trades, the other trades being those set out in the assured's description of his business. When, under an arrangement with a third party, the lorry carries workmen for a lump sum per journey, it is not being used "only for general haulage and other trades," but for the carrying of passengers. It is therefore outside the policy. The arrangement was a new one for a different purpose having nothing to do with general haulage.

Samuels, K.C. : The exception clause only applies when the vehicle is being used for a purpose other than those specified in the schedule. When the assured answered "No" to the question : "Is passenger risk to be covered ?" he did not make a warranty, he merely referred to the benefits to be received, specified later in the proposal form. The answer merely means "I do not require passenger risk to be covered." The policy indemnifies the assured in respect of death or bodily injury to any person except a person in the employment of the assured where the death arises out of the employment, and except a person who is being carried in the vehicle other than one carried by reason of or in pursuance of a contract of employment. The court cannot give a meaning to a clause other than that which it expresses. The words "with the assured" are not included and the legislature had no intention to include them ; they cannot be read into the clause. The warranty is that the vehicle shall be used for general haulage ; this clearly includes the use of returning home with workmen who have been working on the site and taking

them back to their work. The arbitrator found as a fact that there had been no breach of warranty.

Miller, K.C., in reply: There is a complete difference between use for haulage or any other normal trade requirement within the specified trades, and use for the conveyance of passengers.

SLESSER, L.J.: The carriage of Druce's own workmen would have been within this policy.

Miller, K.C.: Only in connection with his specified trades. Druce's contract with Industrial Builders, Ltd., was for two distinct types of service: haulage and the transport of passengers. In *Passmore v. Vulcan Boiler and General Insurance Co.* (5) a lady who was insured in respect of the use of her car for her business purposes used it for purposes connected with her business and also that of a friend; the court held that this use was not covered by the policy. Here also the truck is being used for an additional purpose not connected with that contemplated in the policy.

GREER, L.J.: This is an appeal from a decision of *MACKINNON, J.*, refusing to interfere, on a ground of law, with the decision of the arbitrator in a case which was concerned with the death of a man named Izzard and the consequent action that was brought by his widow under Lord Campbell's Act, and the right which arises under the Third Parties (Rights against Insurers) Act, 1930, by reason of the defendant in the action having become bankrupt.

Shortly, the facts, as they are shown by the case stated, appear to me to be these. On July 21, 1934, the deceased man Izzard, who was a workman in the employ of a building company called Industrial Builders, Ltd., was riding on a lorry which belonged to a man named Druce, who was a haulage contractor and who carried on certain other businesses which are not for the moment material to state. Izzard died on the next day, and his widow brought an action under Lord Campbell's Act against Mr. Druce, whose servant was driving the motor lorry in which, at the moment, Izzard was travelling. That action was decided in her favour and she got a judgment for £850 and costs against Druce. Unfortunately, Druce was a man who could not pay and he was made bankrupt. In those circumstances, by virtue of the Third Parties (Rights against Insurers) Act, 1930, his rights against the insurance company in which he had taken out a policy of insurance were transferred to and vested in Mrs. Izzard. She then made a claim against the insurance company known as the Universal Insurance Company, Ltd., under the rights which she had obtained by reason of the statute I have mentioned. Under a clause in the policy the matter had to be referred, and was referred, to arbitration. The claim was heard by a legal arbitrator of considerable knowledge and distinction, and he decided,

both on the facts and on the law, as I understand his decision, that there was no reason in law which compelled him to find in favour of the respondents or otherwise than in favour of the claimant. He was asked to state his judgment in the form of a special case and, in doing so, he recited the material documents and the facts of the case as he understood them. The special case was first taken to MACKINNON, J., and he decided that there was no ground for saying that the arbitrator was wrong in law in what he had done.

The documents begin, as they always do in insurance cases, with an application form, and in that application form, which is dated Nov. 16, 1933, the insured was asked whether he wanted passenger risk to be covered, and he answered No. I do not understand that to mean he did not want cover against the sort of passengers who were dealt with in the Road Traffic Act, 1930. I think what he meant, and what he was understood by the insurance company to mean, was : I want an insurance for the purposes of my businesses, and I want an insurance which will be in accordance with the insurance I am obliged under penalties to take out under the Road Traffic Act, 1930. That it was so understood by the insurance company I think there can be no doubt, because they gave him a policy which follows, in effect, the wording of the Road Traffic Act, and purports to insure him against two classes of passengers. The two classes I will deal with presently, but there are other matters to be considered before we get to that point. In the application form the applicant declares :

I agree to accept a policy of insurance according to the above proposals subject to the terms, exceptions and conditions to be expressed in and on the policy.

So he is making a declaration for the usual policy with such terms, exceptions and conditions as are expressed in the policy, and the policy may, of course, in terms, negative that which is stated in the application form, even though the application form is deemed to be the basis of the insurance. In order to consider the policy, I find it necessary in the first instance to refer to the relevant provisions of the Road Traffic Act, which, whether or not they were known to Mr. Druce, must have been well in the mind of the insurance company, who are dealing every day with insurances. They have a particular form which does not include passenger risks but which does include matters in respect of which every person is bound, under heavy penalties, to take out a policy before he uses his motor vehicle. Sect. 35 (1) says :

Subject to the provisions of this part of this Act, it shall not be lawful for any person to use, or to cause or permit any other person to use, a motor vehicle on a road unless there is in force in relation to the use of the vehicle by that person or that other person, as the case may be, such a policy of insurance or such a security in respect of third-party risks as complies with the requirements of this part of this Act.

The Act was passed for the particular purpose of giving to third parties who suffer injury through the negligence of servants of insured persons certain rights which they would not have had if this Act had not been passed, by making it clear that they were under an obligation to obtain a policy which would cover third party risks, with certain possible exceptions in the case of a vehicle that was not used for passengers.

Sect. 36 (1) says :

In order to comply with the requirements of this part of this Act, a policy of insurance must be a policy which—(a) is issued by a person who is an authorised insurer within the meaning of this part of this Act ; and

(b) insures such person, persons or classes of persons as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the death of or bodily injury to any person caused by or arising out of the use of the vehicle on a road.

The words of (b), of course, would be ample to cover injury to a passenger on the vehicle if it had not been for the proviso. The proviso is in these words :

Provided that such a policy shall not be required to cover—(i) liability in respect of the death arising out of and in the course of his employment of a person in the employment of a person insured by the policy or of bodily injury sustained by such a person arising out of and in the course of his employment.

That seems to me to mean that, though there is a general obligation to take out a policy in respect of all persons to whom damage is caused by the negligent use of the vehicle on the road, that does not apply to cases in which a person in the employment of the insured has a claim against him under the Workmen's Compensation Act, the reason being that, in their wisdom, Parliament have said that if you are already under an obligation, by reason of the Workmen's Compensation Act, to pay compensation to a man who is injured, you shall not be under any obligation to insure for damage which you may occasion to him by the negligence of your servants. Then it goes on :

(ii) except in the case of a vehicle in which passengers are carried for hire or reward or by reason of or in pursuance of a contract of employment, liability in respect of the death of or bodily injury to persons being carried in or upon or entering or getting on to or alighting from the vehicle at the time of the occurrence of the event out of which the claims arise.

That is to say, there is no general obligation to insure against damage to persons who are passengers, with this exception : that if the passenger is a person carried in pursuance of a contract of employment, then the insurance is to cover that case even though there is no cover for passengers generally. I understand the statute to mean—and the policy, when one comes to consider the policy—that there must be a compulsory insurance in respect of two classes of passengers : one class, where the passenger is a servant of the owner of the vehicle and who is already insured to

the extent of having a claim under the Workmen's Compensation Act ; and the other class, persons who are passengers carried by reason of or in pursuance of a contract of employment. That the effect of the statute was understood by the insurance company is perfectly clear, because they have a printed form, the object of which is to present the insured with a policy of insurance which will comply with his obligations under the Road Traffic Act, 1930.

That application having come before the insurers, they issued a policy, and the policy recites that whereas application has been made for the insurance hereinafter contained and whereas the premium has been paid, " Now this policy witnesseth that subject to the terms exceptions and conditions contained herein or of any endorsement hereon "—then there follows a schedule with particulars describing the business or occupation of Druce as that of a haulage contractor, dairyman, sand and gravel merchant, coal merchant and farmer, and at the end of the schedule, " Warranted used only for general haulage and other trades." Probably the words " other trades " mean the other trades mentioned above as being carried on by the insured. Then there is a special section dealing with liability to third parties, and it is to that special section dealing with liability to third parties that one has to look for the promise of indemnity made by the insurers to the insured. The promise of indemnity is in this form :

The company will indemnify the insured against liability at law for compensation and claimant's costs and expenses in respect of :—Death of or bodily injury to any person caused by or arising out of the use of any vehicle described in the schedule hereto (including the loading and/or unloading of such vehicle).

The description in the schedule is, " Fordson Truck. Warranted used only for general haulage and other trades." Then it goes on to exclude from that general obligation matters which the insured is entitled to have excluded by reason of the provisions of the Road Traffic Act, 1930. The material ones are (b) and (c). Proviso (b) says :

Provided always that the company shall not be liable in respect of the death of or bodily injury to any person in the employment of the insured arising out of and in the course of such employment.

That excludes from the area covered by the promise of indemnity the case of the death of or injury to any person who is in the employment of the insured to whom the insured owes obligations imposed upon employers by the Workmen's Compensation Act in respect of injuries arising out of and in the course of such employment. If one of Druce's men had been injured or killed in the course of the accident that happened to the lorry on July 21, 1934, notwithstanding the fact that this is not an insurance of passengers, he would quite clearly, in my judgment, be entitled to say, " I come within the terms of the indemnity and I am

not excluded by reason of the proviso." But here we are not concerned with the death of a man who was in the employment of the insured. We are concerned with the death of a man who was not in the employment of the insured and, therefore, we have to deal with proviso (c), which excludes from the promise of indemnity in respect of:

Death of or bodily injury to any person (other than a passenger carried by reason of or in pursuance of a contract of employment) being carried in or upon or entering or getting on to or alighting from such vehicle at the time of the occurrence of the event out of which any claim arises.

That, of course, as it stands, would be wide enough to cover the case of Izzard, because he was on the vehicle at the time of the occurrence of the event out of which the claim arose, but the exclusion of liability is subject to an exception from that exclusion, which, unfortunately, is put in brackets,

(other than a passenger carried by reason of or in pursuance of a contract of employment).

If a passenger is within that description, then he is not excluded by the proviso but is included in the general promise of indemnity, and the main question, if not the sole question, in this action—certainly what **MACKINNON, J.**, considered the sole question he had to determine—was whether or not Izzard, the deceased man, came under the words, "a passenger carried by reason of or in pursuance of a contract of employment." I read that exception as if it was equivalent to this, "Provided that the insured will be indemnified in respect of a passenger carried by reason of or in pursuance of a contract of employment." And I regard it as applying only to workmen who are being carried as passengers and not to other people who are not workmen.

The main argument addressed to us by Mr. Miller, apart from what he said in reply, was that those words ought to be read as referring only to passengers carried by reason of or in pursuance of a contract of employment by the insured. Now I do not so read it. I think the policy in proviso (b) has been expressly dealing with the persons in the employment of the insured, and when proviso (b) is finished the policy has finished dealing with persons who are in the employ of the insured and directs itself to another subject, namely the subject of passengers carried by reason of or in pursuance of a contract of employment. If it be not too much of a "bull" to say what it means by omission, the omission of the words "in the employment of the insured" shows, quite clearly, that it is dealing with passengers of a kind different from the passengers that had been dealt with in proviso (b). If it had been intended to confine the insurance to passengers who were being carried in pursuance of a contract of employment with the owner of the vehicle, it would have been so stated, so that there would be no doubt about it. In my

judgment, the learned judge was right in construing this clause as applying to any passenger who was being carried by reason of or in pursuance of a contract of employment with his employer.

Now as regards the facts of this case, it is quite clear that the deceased man Izzard was being carried on this lorry in pursuance of his contract of employment, his contract of employment having given him a right to use the privilege of riding back to his home on the lorry in question. The business of the haulage contractor, Mr. Druce, had been usually carried on at Didcot, and the business of the building company had been usually at Didcot. The haulage work had been done by Druce for the building company in the neighbourhood of Didcot for a very long time, and nowhere else; it did not call for haulage over very long distances. But there came a time when the building company thought that they could and did accept a contract for doing certain building work, or part of certain building work, at Coventry, which was a long way off, and it was therefore necessary for the haulage contractor to provide how that work was to be done. It was to be done by means of the lorries which had previously been used for the vehicular work, and those lorries, moreover, in order that they might do the work, would have to go to Coventry. The mere fact that on the way to Coventry or on the way back they were empty and were not carrying goods would not prevent the work they were doing being within the description of "general haulage work," because it is obvious that there must be many times when a man carrying on a haulage business has his lorries driven when they are empty. They may have to pick up a load at A, take it to B, discharge it at B and then go another journey to C, and pick up a load at C, and during the whole time, whether they have goods on board the lorry or not, they are doing haulage work; they are doing that which is the business of a general haulier. I think that when they were going to Coventry at the beginning of each week whether they had goods on board or not, they were doing haulage work, and when they were coming back for the purpose of bringing home the lorries to where they were usually garaged and where their usual repairs would be done, they were doing haulage work.

Unfortunately, the case is not quite as specific as I should have liked it to be with regard to the facts. As regards the presence of Izzard and the other employees of the building contractor, we find this stated in para. 8:

By a verbal contract made in or about the month of Apr., 1934, between the said Industrial Builders, Ltd. (then developing a building estate at Coventry) and the said William Druce, the said William Druce agreed to do haulage work for the said Industrial Builders, Ltd., between Didcot and Coventry and at Coventry, and to put a lorry at the disposal of the said Industrial Builders, Ltd., for the conveyance of workmen from Coventry to Didcot and from Didcot to Coventry at the week-ends, the terms of payment for the journeys between Didcot and Coventry

being thirty-five shillings per journey whether men were carried on the lorry or not.

I read that as meaning that the verbal contract was really part of the contract for haulage, which was the contract between Druce and Industrial Builders, Ltd. The haulage included the journey from Didcot to Coventry and the return journey at the week-ends from Coventry to Didcot, and the lorries that were used for the purposes of haulage were to be, some of them, at the disposal of Industrial Builders, Ltd., in order that their workmen could get to their homes at Didcot at the week-end. I do not know whether or not, because it is not stated clearly, the lorry to which this accident happened was one of the lorries which had been used during the week for the purposes of haulage, but from the fact that the learned arbitrator decided the case in favour of the applicant, Mrs. Izzard, we are entitled to assume that he did find as a fact that it was one of the haulage wagons that met with the accident which resulted in the death of Izzard.

There are one or two other matters in respect of which I should have liked a plainer statement of what the findings of fact of the learned arbitrator were. He says in para. 10 what the contentions were for the respondents, the insurance company :

That the words contained in the said proposal form "Is passenger risk to be covered?" "No" constituted a warranty that the said commercial motor vehicle would not be used for carrying passengers and that, notwithstanding anything contained in the said policy, the said William Druce was not covered by the respondents for the carriage of the said Bernard George Izzard in the said commercial motor vehicle. (b) that the said commercial motor vehicle on the 21st day of July, 1934, was being used otherwise than for the purpose mentioned in the schedule of the said policy.

That is a mixed question of law and fact, and I should prefer to have had a definite statement by the learned arbitrator that the lorry in question was one which had been used for the purposes of the haulage contract. All he says about it is :

Subject to the opinion of the court, I am of the opinion that the respondents' contentions are incorrect.

They might be incorrect merely in law or incorrect in something which was a mixed question of fact and law, but I understand his final decision as meaning that this lorry that met with the collision which occasioned the death of Izzard was one of what I may describe as the haulage lorries. I myself always prefer a case to state separately what the arbitrator's findings of fact are and then to ask the question whether, as a matter of law, his findings were right or wrong ; but it is not so stated. It is stated as to whether his findings are correct, which means, I think, correct in law, and if they are correct in law, the findings, so far as they deal with facts, cannot in any way be interfered with.

I have dealt with the substance of the matter, but there is one argument on the policy that was stressed, especially in his reply, by Mr. Miller on behalf of the insurance company. He says that there are certain general exceptions of the policy. I do not accept the view that those general exceptions can be relied upon as cutting down the expressed promise in regard to liability to third parties contained in sect. II, but in any case I do not think they apply, for this reason. One of the general exceptions is :

The company shall not be liable in respect of :—(1) any accident, injury, loss, damage and/or liability caused, sustained or incurred whilst such vehicle is :—(a) Engaged in racing, pacemaking, reliability trial or speed testing or whilst it is being used otherwise than for the purposes mentioned in the schedule hereto or is drawing any trailer or is being used for hire or reward.

I am not satisfied that the case was made on that point before the arbitrator, although it does appear on the face of the case, as he states it, that we have to deal with it. I look at the description of the use to which the insured says in the schedule that he is going to put his lorries, and he says, "General haulage and other trades." In my judgment we must treat the arbitrator's finding as meaning that the lorry in question was being used for general haulage, and no less so because at the time of the accident it was going to the garage for the week-end and going home, so far as we know, without any load upon it but only with the workmen who were travelling in it to their homes in accordance with the agreement. It is quite plain that Industrial Builders, Ltd., had made an agreement with Izzard that he would be entitled to travel on this lorry, and that Druce and Industrial Builders, Ltd., had made an agreement under which, for the convenience of the carrying out of the haulage work, permission should be given to the employers to give their workmen the right of travelling home at week-ends upon the lorry.

Then something was said about the latter words of the general exception, "or is drawing any trailer or is being used for hire or reward." That is an argument which does not impress me at all, because whenever a lorry, whether full or empty, is going on any of its journeys, it is being used for hire or reward, and it cannot be meant by that exception that because it is being used for hire or reward, therefore it must be excluded from the indemnity which is expressly stated in sect. 2 in reference to the liability to third parties.

Hewitson's case (1) was a case in which the workman was being carried by a railway company, and he brought his claim for workmen's compensation against his own employer, which had nothing whatever to do with his claim against the railway company. It was then seen that he had no claim against the railway company, the carriers, because he had agreed to the terms that they should not be responsible. I cannot

help thinking that if he had not so agreed, he would have had a claim against the railway company, the carriers ; and I think in the present case Izzard was in the same position as Hewitson. He had no claim against the employers, but he had a claim, and his widow had a claim, against the carrier. The carrier in this case was Druce, who was in the same position as the railway company in *Hewitson's* case (1). I cannot help thinking that cases like *Hewitson's* case (1) were well known to those who dealt with insurance matters, and that proviso (c) of sect. II of the policy was inserted in order to cover the case of a claim against the carrier by a person in the position of Izzard, if he had such a claim against a third party.

For these reasons I agree with the learned judge, MACKINNON, J., and with the arbitrator, that the claimant was entitled to succeed in the arbitration and to be paid the sum of £850 under the terms of the policy of insurance taken out by Mr. Druce. The appeal, therefore, so far as my judgment is concerned, will be dismissed with costs.

SLESSER, L.J. : The decision in this case turns upon the interpretation of a policy of insurance and the relevant documents connected therewith, because what has to be shown by the present claimant in order that she may succeed is that the deceased was one of the persons covered by the insurance issued to Mr. Druce. In my opinion, although it may be useful to consider the provisions of the Road Traffic Act, 1930, particularly sects. 35 and 36, it would not be right in construing this policy to have regard to the actual terms of that Act except in so far as the knowledge of the provisions of that Act may be material in ascertaining the surrounding circumstances in which this policy was issued. Sect. 35 puts an obligation upon persons who use vehicles on the road to comply with certain requirements in respect of insurance policies, and those requirements are stated in sect. 36. If this particular policy does not satisfy those requirements, it may be that Mr. Druce has committed an offence, or failed to do that which the Road Traffic Act, 1930 required him to do. Primarily, we have to consider here what was the contractual relation between Mr. Druce on the one hand and the Universal Insurance Company on the other, and that contractual relation is contained in the terms of the policy itself. As a matter of fact, little difference arises in the present case, because the policy contains in its exceptions and obligations substantially the language of sect. 36 of the statute.

In the first place it is important to observe that in the proposal form, in answer to the question whether passenger risk was to be covered, the applicant for the insurance answered "No", and clearly the proposer, so far as the proposal form was concerned, did not ask to be insured against passenger risks and paid his premium on the basis that passenger risks

were not to be covered. Nevertheless, when the policy itself is regarded it is clear, to my mind, that certain passenger risks are covered, and the question which has to be considered is whether this particular passenger risk which was here incurred was or was not covered. Yet I think it is material to remember at the outset that the proposal form, which is by incorporation declared to be the basis of the contract, was one which was not to cover passenger risks.

The liability to third parties, which is contained in sect. II (1) of the policy, provides that :

the company will indemnify the insured against liability at law for compensation in respect of death to any person caused by or arising out of the use of any vehicle described in the schedule hereto—

I omit immaterial matter. That indemnity by itself, if there were nothing more, would include an indemnity to a passenger upon the vehicle, because such a person would or might be injured in an accident arising out of the use of the vehicle ; but there is to that general liability a series of provisos, and proviso (c) has the effect, in my opinion, of excluding most passengers from cover under the policy. That proviso is as follows :

Provided always that the company shall not be liable in respect of . . . (c) death of . . . any person . . . being carried in or upon . . . such vehicle at the time of the occurrence of the event out of which any claim arises—

I omit the exception to the exception. It follows, therefore, that were there no other words, Mr. Izzard being a passenger who was killed while being carried in the vehicle, the insurance company, notwithstanding the general indemnity “for the death of any person arising out of the use of the vehicle,” would be excluded from liability by reason of those words of proviso (c).

Now it is said that there is contained in proviso (c) certain words which bring back into liability persons such as Mr. Izzard, and those words are as follows. Having provided that the company shall not be liable in respect of passengers, as I have related, these words appear in brackets in the middle of proviso (c) :

(other than a passenger carried by reason of or in pursuance of a contract of employment).

Can it be said here that Mr. Izzard was a passenger carried by reason of or in pursuance of a contract of employment ? The fact is that Mr. Izzard was being carried by reason of or in pursuance of a contract of employment in one sense ; that is to say, he was employed by a third party, Industrial Builders, Ltd., and was—there is no question—at the time of the accident one of their employees. But he was not at the time of his death in a contract of employment with the insured, and the

question which has to be determined is whether those words "other than a person carried by reason of or in pursuance of a contract of employment" are apt to extend not only to a person carried in pursuance of a contract of employment with the insured, but also to a person carried in pursuance of a contract of employment with somebody else.

There is in my view not very much assistance to be obtained from another clause to which reference was made, proviso (b), but argument has been directed to the effect of proviso (b) on the interpretation of proviso (c), and therefore I refer to it. Proviso (b) excludes from liability the death of any person in the employment of the insured arising out of and in the course of such employment. It will be noticed, in the first place, that there is no reference at all to passengers in proviso (b). It is general in its terms, and if it be shown that the death arose out of and in the course of the employment, it would appear that the company in such a case was not to be liable. Nor, in my opinion, can this proviso be limited to cases which come within the ambit of the Workmen's Compensation Act. There may be persons whose deaths arise out of and in the course of their employment but, by reason of the magnitude of their earnings or the casual nature of their employment, or other exceptions enumerated in the Workmen's Compensation Act, do not come within the ambit of that Act at all, yet, nevertheless, proviso (b) does provide that the company shall not be liable :

in respect of the death of or bodily injury to any person in the employment of the insured arising out of or in the course of such employment.

To take an illustration, a non-manual worker earning a wage higher than that which qualifies for compensation under the Workmen's Compensation Act might be said to have sustained death arising out of or in the course of the employment by the insured. Such a person would not, however, receive compensation under the Workmen's Compensation Act. Therefore, I do not think it is right to say that proviso (b) is limited to cases under the Workmen's Compensation Act, but it is limited to cases where death arises out of and in the course of the employment. From this I come to the conclusion that any argument which is based upon a contrast between persons covered by the Workmen's Compensation Act and persons not so covered is fallacious because the first stage of the argument fails. If (b) had referred in terms to the Workmen's Compensation Act, something might have been made of that argument. In my opinion, for the reasons I have stated, it does not do so.

That leaves an obligation to construe proviso (c), which I think has to be construed in its proper meaning altogether, apart from any assistance—as I think none can be derived—from the contemplation of proviso (b). In the first place, I would make this observation: that

in proviso (c) the words "other than a passenger carried by reason of or in pursuance of a contract of employment" contemplate that a person may be carried by reason of or in pursuance of a contract of employment—in fact, in the employment of the insured. Such a person, for example, is indicated by a consideration of certain of the Workmen's Compensation cases, merely as illustrations, such as the case of *St. Helens Colliery v. Hewitson* (1). There, a workman was employed at a colliery and was injured in a railway accident while travelling in a special colliers' train from his work to his home. There was an agreement between the colliery company and the railway company by which the railway company agreed to provide special trains, and workmen who desired to travel by these trains signed an agreement with the railway company releasing them from all claims in case of accident, and the railway company provided the men with passes and charged them sums representing less than the full amount of the agreed fare. On the question whether such a man, being injured, could successfully sue the employers, the *St. Helens Colliery Company*, it was decided that he could not. It was found that the accident did not arise out of and in the course of his employment, but that, in the language of LORD BUCKMASTER, at p. 66 :

it was an implied term of the contract of service that the train should be provided by the employers,

though the man had the choice, as in this case, whether he would or would not use the vehicle.

Such a case would appear to me to fall within proviso (c). It would be a case of a passenger carried by reason of or in pursuance of a contract of employment, but as he was not a person whose injury arose out of and in the course of the employment, it would not be defeated by proviso (b). Therefore, in my opinion, if the employer in *Hewitson's* case (1) had under this policy been insured in respect of the unfortunate workman, such a man would have been covered by the provisions of proviso (c), not being excluded by proviso (b). That seems to me to afford a meaning to proviso (c). So also, here, I am of opinion that had this deceased man been employed by Messrs. Druce, and a lorry had been provided in the way suggested, with an option whether he would use it or not, he would be a person who, while being so carried, met his death by reason of or in pursuance of a contract of employment, for were it not for his contract of employment he would not have been offered, as para. A of the case stated says, "a lorry . . . at his disposal if he desired to go home to Didcot at week-ends." Such a person would, I think, clearly fall within the ambit of proviso (c). Therefore that in itself affords a meaning and a purpose to proviso (c), and also a meaning to that provision in the statute.

But the case here has to be carried farther. It is said here that Mr.

Izzard is covered by these words because he was in a contract of employment, which contract of employment, it is stated, did not exist between himself and Mr. Druce, who was carrying him. I do not think it is possible to say that he was being carried in pursuance of a contract of employment between himself and Mr. Druce. He was being carried in consequence of a contract of employment, as para. A of the case stated recites, "between the said Industrial Builders, Ltd., and the said Bernard George Izzard." It was because of that contract of employment, and not because of any contract of employment between him and Mr. Druce, who indeed had no direct *nexus* of employment with him at all, that he was being carried. It is true that the words, taken in one sense, are wide enough to cover such a case, but I cannot myself think that it was the intention of the parties, as expressed in the language to which they have reduced their agreement, that such a situation should arise.

The view which Mr. Samuels presents for our consideration would produce this result : that, whenever Mr. Druce, assuming he is engaged in haulage work (about which I will say something in a moment) takes up a passenger who has a contract of employment with any other person in the world, such a person would be a passenger, if he sustained death, covered by this proviso (c). With every respect to my Lord's view, I cannot see any justification for limiting the word "passenger" in that context to a workman. It says, "a passenger carried by reason of or in pursuance of a contract of employment." An opera singer who had a contract of employment and who required a lift at Didcot to catch her train back to Paddington in order to sing at Covent Garden, assuming the vehicle was at that moment engaged on haulage work, would appear to me to be a passenger carried by reason of or in pursuance of a contract of employment, if the opera singer had agreed with her employer at Covent Garden, who had made some agreement with the haulage contractor, that she should have that expeditious method to return from her week-end cottage to sing at the opera. I cannot believe that the expression "contract of employment" can be given so extended a meaning, because all that is required on that view is, first, a contract of employment between a third party and the person who is killed, and secondly, a conveyance in the vehicle in pursuance of a contract of employment which might at any time be made between the insured and the third party.

I think some limitation must be put, and must have been intended by the language to be put, upon those words. Having regard to the fact that these two parties have contracted that there should be no passenger risk insured, having regard to the fact that the proposal form is made part of the insurance, and having regard to the fact that the contract is one made between the insured and the insurance company, I think a contract of employment must be taken to mean a contract of employ-

ment to which the insured is himself a party. If that is the right view of those words, it follows that this appeal must succeed, because Mr. Izzard was not being carried as a passenger by reason of or in pursuance of such a contract of employment; he was being carried by reason of a contract of employment with a third party.

The case is not an easy one, and the language, as so often happens in these policies, is difficult of construction. As I say, even if one is driven to look at the circumstances that this policy was entered into to satisfy the requirements of the Road Traffic Act, 1930, one gets no assistance at all from the Act, because exactly the same language is used in the proviso to sect. 36 (1) (b) (ii), and the same problem arises as to the meaning of the words "contract of employment." I have said enough to show that in my opinion those words can be used to cover the case of men employed by the insured who, for one reason or another, are not struck at under proviso (b), but are persons who, though their carriage does not arise out of or in the course of their employment, yet are carried by reason of or in pursuance of a contract of employment. Apart from niceties, some of which I have indicated, the probability is that the intention of (b), though it is not properly expressed, was to cover what, broadly speaking, may be called "workmen's compensation cases," and the intention of (c) may have been to cover cases like *Hewitson's* case (1) and the later case of *Taylor v. McAlpine & Sons* (2), where an arrangement is made between third parties and the employer that the workmen of the employer shall be carried by the third party—two cases in which, when an accident occurs, it cannot properly be said to arise out of and in the course of the employment. That seems to me to provide a sufficient meaning to proviso (c), which we have here to construe.

There remains only the further argument of Mr. Miller that in any case this vehicle was not engaged upon haulage work at the time of this accident, and therefore the basic condition of the policy was never satisfied; or, alternatively, it was within the general exception—that is to say, it is a case where the company is not liable where the vehicle is being used for hire or reward. As my Lord has rather indicated, the two questions are very closely allied. On this matter I am not prepared to differ from what must, I think, have been assumed by *MACKINNON*, J., and by the learned arbitrator, and has been stated with approval by my Lord as the proper inference to be drawn from the findings in para. 8 of the case. It being stated that there was a contract by which haulage work was to be done between Coventry and Didcot and at Coventry, and also that a lorry should be at the disposal of the said Industrial Builders, Ltd., for the conveyance of workmen from Coventry to Didcot and from Didcot to Coventry at the week-ends, I think the whole matter of bringing the workmen to and fro does sufficiently come within the

warranty that the vehicle is to be used for "general haulage and other trades," though at times the particular vehicle was empty. I would assume, in the absence of any finding to the contrary, the learned arbitrator having found in favour of the claimant, that in all probability the vehicles which were used for the purpose of carrying these workmen were the identical vehicles which were used either immediately before or generally for the purpose of haulage. Had the matter, therefore, remained on Mr. Miller's second argument with regard to haulage, and also with regard to hire or reward—because I think the hire or reward was merely the consideration for the whole contract moving between Industrial Builders, Ltd., and the insured—I should have come to the conclusion that this appeal should fail. But I think this appeal succeeds because, in my judgment, Izzard was not a passenger carried by reason of or in pursuance of a contract of employment. For the reasons I have stated I think, therefore, that the insurance company, as appears in their proviso to sect. II (1), were not liable for the death of Izzard because, not being within those words in the brackets, he falls within the general exception to the liability in the proviso, and so is a person whom the insurance company never contracted to cover. In my opinion, therefore, this appeal should be allowed.

SCOTT, L.J. : This, like many questions of interpretation of a document, is a case of considerable difficulty. I in fact share the view which has just been expressed by SLESSER, L.J., but I differ from MACKINNON, J., and GREER, L.J., with considerable diffidence.

The one and only question is whether the claim is within the policy. The question whether, if it is not within the policy, a breach of statute has been committed by the insured, is irrelevant. It does not affect any issue upon which the appeal depends. The statute, indeed, has no relevance except in so far as the statutory duty imposed by it upon the insured was a surrounding circumstance which both parties must be taken to have had in mind and which the insured must be presumed to have intended to fulfil. This, like all evidence of surrounding circumstances, is naturally material to interpret the written contract where its meaning is doubtful. The only question of fact that calls for consideration is the nature of the relationship between the insured and Izzard and, perhaps, the manner in which the motor lorry was used. I agree with the conclusion of my brethren on that last point, that the lorry was in fact being brought back to Didcot like a cargo ship, so to speak, to its home port, at the end of the week's haulage work, which was at Coventry. If I may continue my nautical metaphor, instead of the ship being brought back in ballast it was converted into a passenger ship and chartered for a lump sum freight to Industrial Builders, Ltd., for the carriage of their men to Didcot. Those, I think, are the facts that are material as regards

the wagon. As regards the relationship between Izzard and the insured, it is that Izzard was a complete stranger for all purposes to the insured, and he was in no relationship at all material to any question in the case except to and with his employers, the building company.

In order to see what the insured's duty under the Act was, which is a circumstance which has to be borne in mind, we have to construe the Road Traffic Act, 1930, s. 36 (1), and I should like to venture an interpretation of that section. We must construe it, and construe it with care, because the policy was taken out under a statutory obligation to insure, and the statute, as it seems to me, under sect. 36 (1) (i), does not make it essential to cover the liability to persons where they are in a position to recover workmen's compensation, but does provide, inferentially, that they must be covered, or ought to be covered, against accidents where they cannot get workmen's compensation. In that respect I entirely agree with what SLESSER, L.J., has said, and think that cases in the line of *Hewitson's* case (1) illustrate the kind of contingency that may have been in the mind of Parliament. Secondly, passengers in or upon the insured's vehicle are not within the compulsion of the statute, there being no duty to insure against liability to them unless they are passengers being carried either for hire or reward or (and this is another category) by reason of or in pursuance of a contract of employment. In that case the statute says there is a duty to see that the policy covers liability to passengers. It is to be noticed that in subsect. (1) (ii) the words are :

except in the case of a vehicle in which passengers are carried for hire or reward.

I think the right interpretation of that phrase is this : that where passengers are being so carried, then the policy must be one which will insure the liability of the insured to them. That is the reason why I read it as I did : there is no obligation to insure liability to passengers unless they are passengers being carried for hire or reward. Then as regards the next exception, I again repeat " unless they are passengers being carried by reason of or in pursuance of a contract of employment." The first point I want to make is that " being carried," as it seems to me, necessarily means being carried by the insured. The second point is that where it says " for hire or reward," I think that means payable to the insured, and the contract of employment there referred to, it seems to me, must mean a contract to which the insured is a party. The whole exception seems to me to relate to matters in which the insured is directly concerned and over which, it is assumed, he has or has had some control, in that he is contractually interested in the matter.

Broadly, my reasons can be put under two heads. The first is the grammatical reason : passengers being carried by the insured for reward to him in pursuance of a contract—with whom ? With him. It seems to

me contrary to common sense to suppose that he could know anything at all about contracts of employment made by Tom, Dick or Harry as employers, or with other gentlemen otherwise named who happened to be on his vehicle. He can only be assumed, so to speak, to know about those persons who are in contractual relationship with him. Why should he have his duties altered merely because of the possibility of contractual relations that particular passengers may have made with other people. Secondly, unless an express exception to the general exception of passengers from the obligation of the statute is made, which will give those of the insured's own employees who have no right to compensation the protection of the policy, those employees will be left out in the cold altogether, and on that I agree with what SLESSER, L.J., has said. I cannot think it is consonant with a sensible interpretation of a statute to suppose that we ought to employ these words (and I do not think GREER, L.J., suggested it): "in pursuance of a contract of employment, whether with the insured or some other person." I think we must choose between "contract with the insured" on the one hand, and "contract with other parties" on the other hand; and secondly, it follows, as it seems to me, that the insured's own employees who cannot recover compensation would be left out in the cold, so to speak, beyond the protection of this Act, which is intended to protect people who are injured by motors, unless you construe the words "contract of employment" as meaning "employment by the insured." For those reasons it seems to me that that is the correct interpretation of the statute.

Now, the interpretation of the statute does not conclude the matter, though from one point of view it goes a long way towards doing so. The interpretation of the policy is the problem, and that problem divides itself, in my mind, into two questions. One is, what is the ambit of the policy? On that, my view is a very clear one: that the proposal form which is incorporated in the contract for all purposes as part of the contract, and is, indeed, a basic part of the contract by reason of the language of the policy, is an essential document for the purpose of deciding what is the ambit of the policy. One must remember that the proposal is quite truly, in the language of the contract, a proposal. It is an offer by the insured to the company, saying: "I will insure with you on these terms if you are willing," and the issue of the policy is the acceptance of that proposal. When it is accepted by the issue of the policy, which incorporates the proposal, it is beyond all doubt that the intention of the policy must be not to introduce a new term differing from the offer of the insured, but rather to accept that offer in accordance with its plain meaning. The line of cases like *Provincial Insurance Co. v. Morgan & Foxon* (3) have made it quite clear—I think it was clear before on the earlier cases, but it is quite clear now—that the description

of the purpose for which the policy is issued is to be read as a definition of the ambit of the insurance, or the scope of the risk, whichever expression one likes to adopt. The judgment of SCRUTTON, L.J., in *Morgan's* case (3), at pp. 78 to 83, in my view, is a complete discussion of the principles involved and of the cases that are relevant to the discussion, and makes it quite unnecessary for me to go into any of the cases beyond saying that I entirely adopt the whole of that judgment (which, of course, is binding upon this court as a judgment) in regard to what SCRUTTON, L.J., said by way of reasoning in coming to the conclusion to which he did come. The gist of that conclusion, as I see it, is this: that the description, or what I call the ambit of the insurance, the definition of the risk, is the dominant term of the bargain. Unless there is anything in the clauses of the policy itself to show that that ambit is extended beyond what it is described to be in the main passages of the proposal and the policy which purports to describe it, and unless that extension appears in absolutely clear language I think you must interpret the policy as limited to that ambit.

On the question whether there is any term which in any way extends the ambit in the particular case before the court, one has to bear in mind certain points. First, the policy is in a printed form, whereas in the proposal the passenger risk is excluded in writing. Secondly, in the policy which accepted the proposal without purporting to make any variation from it, the proposal being made the basis of the contract and incorporated as it stood, the description of the ambit of the insurance or of the risk is also in writing in the phrase: "Warranted used only for general haulage and other trades." Thirdly, if the description of the risk gathered from the proposal and that warranty in the policy is plain, it follows that any alteration of that dominant provision of the bargain must be construed on the principle that, unless it is quite clear that the dominant term is to be altered, the clause which it is argued extends the ambit ought not to be construed as extending it.

Lastly, I want to deal with the suggestion (because it is put in this form also) that in the policy sect. II, proviso (c) does extend it. First, I say that unless it does so clearly it cannot be used for the purpose of extending the risk. Secondly, I think the difference of opinion between my learned brethren shows that there is a *prima facie* appearance of its not being very clear. On the view of GREER, L.J., that it refers to contracts with other employers, I venture respectfully to make these comments: first, the same comments as I made in construing the Act; and secondly, the additional comment that it is very difficult to presume an intention by the insured to do something essentially different from his proposal beyond, at any rate, what is clear in the printed words of the policy.

If those views are right, it remains to consider for a moment the

judgment of MACKINNON, J., because there are two or three criticisms I should like to make upon it. On p. 5 he says :

If the second part of the proviso, "carried by reason of or in pursuance of a contract of employment," means a contract of employment with the insured, it is difficult to see why that would not be merely repeating the words in the previous part of the proviso.

I cannot help feeling that the learned judge had not in mind cases like *Hewitson's case* (1), because I think that they are the answer, as SLESSER, L.J., has said, to that particular difficulty which the learned judge felt. On p. 6 he goes on :

I see no reason for adding to the words used in the Act of Parliament and in the proviso to this policy, the three words "with the insured" after the words "a contract of employment."

The reasons SLESSER, L.J., has given are sufficient to answer the learned judge's difficulty. On p. 7 he uses language which I find a little difficult to follow. He says :

Druce himself and the company were both subject to the obligations of sect. 36 of the Road Traffic Act, 1930, and though Druce may have undertaken that his vehicle would not be used for carrying passengers, notwithstanding that, it is quite clear that the company has to, and does, notwithstanding that warranty or undertaking by Druce, undertake that it will indemnify him against liability.

I do not follow that language. It seems to me, as I suggested in the course of the argument, that there the learned judge is saying, in effect, that that term is implied in the contract as an undertaking which the company agreed to give. I think that that is begging the question. In my view, those are the fallacies which underlie the judgment of the learned judge.

My conclusion is that in this particular case, on the facts found by the learned arbitrator, the award and the judgment of MACKINNON, J., were both wrong because they disregarded what I call the dominant terms of the policy : that it was not to cover passenger insurance except so far as in the second section of the policy an insurance against liability to passengers should be stipulated for, in certain circumstances, in quite clear terms. On the facts of the case, in my view, the death of Izzard by the negligence of the driver of the insured's vehicle was not brought within any clear provision saying that he, a passenger, was a person liability to whom was covered by the policy. For these reasons I think the appeal ought to be allowed.

Appeal allowed with costs.

Leave to appeal to the House of Lords.

Solicitors : A. D. Vandamm & Co. (for the appellant company) ;
L. Bingham & Co. (for the respondent).

[Reported by DEREK H. KITCHIN, ESQ., Barrister-at-Law.]

JACKSON v. JACKSON AND BARWELL.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Bucknill, J.), **July 16, 24, 1936.**]

Divorce—Costs—Husband suing as poor person—Profit costs—Special circumstance—Ability of co-respondent to pay—R.S.C., Ord. 16, r. 31B (2).

A husband petitioner suing as a poor person claimed and was awarded damages against the co-respondent. The co-respondent did not contest the issue of adultery, but contested the question as to damages. The petitioner asked for an order that the co-respondent should pay the petitioner profit costs. It was argued that the evidence indicated that the co-respondent could afford to pay costs on the ordinary footing, and that this was a special circumstance within R.S.C., Ord. 16, r. 31B (2), which enabled the court to make an order for the payment of profit costs:—

HELD: the fact that the co-respondent had some means did not constitute a special circumstance within R.S.C., Ord. 16, r. 31B (2), and the co-respondent should not be ordered to pay profit costs.

[EDITORIAL NOTE.] The possession of means by a person ordered to pay costs is no sufficient reason why a party suing as a poor person should be allowed to recover profit costs. It is not a special circumstance within R.S.C., Ord. 16, r. 31B (2). If it had been intended to alter the practice of the court in this way, the view is expressed that it would have been expressly so stated in the revised rules, which came into force in 1935.

FOR COSTS UNDER POOR PERSONS' RULES, see HALSBURY, Hailsham Edn., Vol. 10, pp. 758, 759, para. 1198; and FOR CASES, see DIGEST, Vol. 27, p. 477, Nos. 5050-5052. FOR THE R.S.C., ORD. 16, r. 31B, see YEARLY SUPREME COURT PRACTICE, 1936, pp. 237, 238.]

Cases referred to :

- (1) *Gribble v. Gribble* (1929), 45 T.L.R. 192 ; Digest Supp.
- (2) *Laurence v. Laurence* (1929), Times, Apr. 17.
- (3) *Davis v. Davis* (1933), Times, Mar. 11.
- (4) *Richardson v. Richardson & Plowman*, [1895] P. 276 ; 27 Digest 423, 4289.
- (5) *Carson v. Pickersgill & Sons* (1885), 14 Q.B.D. 859 ; 42 Digest 257, 2902.

ADJOURNED HEARING of a petition for dissolution of marriage by a husband suing as a poor person on the question whether the fact that the co-respondent had sufficient means to pay costs on the ordinary footing was a special circumstance enabling the court to make an order for profit costs against him within R.S.C., Ord. 16, r. 31B (2).

Richard Ellis for the petitioner.

Theodore Turner for the co-respondent.

BUCKNILL, J. : The question for decision in this case is whether I ought to order the co-respondent to pay profit costs in respect of this petition.

The petitioner is suing as a poor person, and claimed damages from the co-respondent. The jury awarded him £200. The co-respondent at the hearing did not contest the issue of adultery, but contested the

question as to damages. There was nothing unusual in the case. Counsel for the petitioner asked for an order that the co-respondent should pay the petitioner profit costs on the ground that the evidence indicated that he could afford to pay them. The rule at present dealing with the matter is R.S.C., Ord. 16, r. 31B (2), and was made on Jan. 1, 1935. The effect of this rule so far as the present case is concerned is that the court may order the out-of-pocket expenses of the petitioner to be paid by the co-respondent, and may order the co-respondent to pay the costs of the petitioner, including profit costs, but excluding fees to counsel or court fees, if the co-respondent has acted unreasonably in defending the proceedings or in his conduct of them or the special circumstances of the case require it.

It was argued that in this case the fact that the co-respondent had some means constituted special circumstances which required me to make an order that the petitioner should have profit costs. The argument was that it would be unjust to the petitioner's solicitor if in such a case he was to have no financial remuneration for his work, and that this view had been judicially recognised in the case of *Gribble v. Gribble* (1), where profit costs had been granted. In that case the wife petitioner suing as a poor person proved that her husband had left her and gone to New Zealand with another woman. It was argued that the fact that the man could afford to go with another woman to New Zealand constituted special circumstances in the case to justify the court in ordering profit costs under R.S.C., Ord. 16, r. 31B of the then existing rules. BATESON, J., made an order for profit costs, apparently on the ground that the husband left his wife and went off to New Zealand with another woman.

In *Laurence v. Laurence* (2) the husband was the petitioner and sued as a poor person. In that case LORD MERRIVALE, P, is reported to have said that if costs could be recovered against the co-respondent he saw no reason why the Poor Persons Rules should shelter him.

In *Davis v. Davis* (3) the petitioner husband sued as a poor person and obtained £2,000 damages from the co-respondent. On the question of costs BATESON, J., is reported to have said that he thought it necessary for the protection of solicitors generally that if there were circumstances in which they could recover something towards the costs of their efforts they should do so. There was a great deal of poor persons work which they did for nothing, but it was right that when a proper case came along they should be remunerated. The hearing of that case occupied two days, and it was a proper case for profit costs.

These cases were all decided under the rule which preceded the rule now in force. That rule stated in effect that where it appeared to the judge that the special circumstances of the case required it, the judge might order that the costs should include profit costs and charges, but

not any fees to counsel. So far as *Davis v. Davis* (3) is concerned the unusual length of time occupied (which is now a feature specially dealt with under R.S.C., Ord. 16, r. 31B (3)), would be "special circumstances" within the old rule.

It is clear from the report of the Poor Persons Procedure Committee, dated July 30, 1934, and published by H.M. Stationery Office in 1934, on which the present rule is based, that the framers of the rule were largely concerned with the question whether, and if so, when, profit costs ought to be paid by an unsuccessful party to a suit brought by a poor person. So far as this case is concerned the new rule specifies three grounds on which profit costs can be ordered, namely, unreasonable defence or conduct of the co-respondent, proceedings of unusual length or difficulty, and "special circumstances." If the framers of the rules wished to include as a ground for ordering profit costs the fact that the co-respondent had sufficient means to pay them, the rule could, and, as I think, would have said so. The only reference to the means of the other party as a material factor on the question of costs is R.S.C., Ord. 16, r. 31B (5). This states that where an order is made to pay costs under this rule, the order shall not be enforced without the leave of a court or a judge, and the court or judge may refuse leave if satisfied by the party ordered to pay the costs that he has not the means to pay them. In other words consideration of the question as to the means of any other party to pay profit costs seems to be postponed until the time comes for enforcement of the order. Moreover, the fact that the co-respondent has some means can hardly be said to constitute special circumstances which require a special order for profit costs. As Mr. Turner on behalf of the co-respondent pointed out, claims for damages are not usually made against men of no means.

The position of a poor person litigant is peculiar as regards costs. R.S.C., Ord. 16, r. 28, expressly enjoins that unless the court or a judge shall otherwise order, no poor person shall be liable to pay costs to any other party or be entitled to receive from any other party any profit costs or charges. The power of the court to order costs to be paid by another party in a poor person's case is limited by the provisions of the subsequent rule 31 of the same order to which I have already referred. Although it may seem hard on the solicitor who undertakes a poor person's case that profit costs cannot be recovered against a co-respondent who has means, some provision is made for his remuneration by R.S.C., Ord. 16, r. 31c. That rule enables the judge to order to be paid to the solicitor out of any money recovered by the poor person, a sum in respect of costs, which may not exceed one fourth of the amount recovered after deduction of all proper disbursements made by the solicitor.

The old rule as to costs in the Divorce Court where the petitioner sued as a pauper followed the rule of the common law, and did not allow the

petitioner to receive any profit costs from the co-respondent: see *Richardson v. Richardson & Plowman* (4). The basis of the common law rule, as explained in *Carson v. Pickersgill & Sons* (5) by LORD ESHER, M.R., was that in ordinary cases where the plaintiff succeeded, the defendant was bound to pay the reasonable costs which the plaintiff had paid or made himself liable to pay in consequence of the defence, but in a case where the pauper plaintiff was not liable to pay costs, the plaintiff was not allowed to make a gift out of his pocket to the lawyers who had been engaged on his behalf, in the form of a gratuitous payment of fees to them, and then to demand reimbursement of these sums from the defendant. The rule as to costs in proceedings *in forma pauperis* laid down in *Carson v. Pickersgill & Sons* (5) prevailed until 1914. In 1914 proceedings by paupers were renamed proceedings by poor persons, and rules of the Supreme Court were made which somewhat modified the old rule as to non-recovery of costs by a successful litigant suing *in forma pauperis*. By R.S.C., Ord. 16, r. 30, the court or a judge was authorised to certify for profit costs (excluding fees to counsel) if the person ordered to pay costs to a poor person had acted unreasonably in prosecuting or defending or opposing the proceedings. This rule has been modified from time to time and in 1935 the present rules were made.

It appears to me, therefore, that since 1914 the rules have departed to some extent from the old common law rule that since no profit costs are payable by a poor person no order for profit costs can be made in his favour, but apart from such departure the principle of the old common law rule still remains good, as laid down in *Carson v. Pickersgill & Sons* (5).

I come back, therefore, to the question as to whether there are in this case special circumstances which require an order for profit costs to be made against the co-respondent. The only possible ground is that the co-respondent has means to pay, and that therefore justice requires that the solicitor for the poor person should receive some remuneration for his voluntary and honourable services. I do not think such a ground is a special circumstance requiring profit costs to be given. I therefore condemn the co-respondent in the costs of the petitioner and make no special order as to costs.

I should like to take this opportunity of expressing my appreciation of the efficient and valuable work done by counsel and solicitor in this case, and in many other cases conducted in this court on behalf of poor persons. They receive no financial compensation whatever, and often do the work at considerable personal inconvenience, but the standard of their work does not appear to suffer in consequence.

Solicitors: *Milner & Bickford* (for the petitioner); *H. N. & E. H. Philcox* (for the co-respondent).

ENGLISH *v.* BLOOM AND LONDON PASSENGER
TRANSPORT BOARD.

SIEGENBERG *v.* BLOOM AND LONDON PASSENGER
TRANSPORT BOARD.

[KING'S BENCH DIVISION (Singleton, J.), July 22, 1936.]

Practice—Separate writs—Consolidation—Payments into court admitting liability by each of two defendants—One plaintiff recovering more and one less than amount paid in—Form of order.

A taxicab, driven by the first defendant was caught between two tramcars belonging to the second defendants. The two passengers in the cab sued both defendants. One firm of solicitors acted for both plaintiffs, and they issued two writs and separate statements of claim. Separate defences having been delivered, the actions were by order consolidated, and later the defendants paid into court with admission of liability £225 in respect of the first plaintiff's claim, and £125 in respect of the second plaintiff's claim. Judgment was given for £200 in the case of the first plaintiff and for £185 in that of the second :—

HELD : (i) the issue of separate writ was a matter wholly within the discretion of the solicitors.

(ii) the proper form of order was : Judgment for the first plaintiff for £200 with costs up to date of payment in, this plaintiff to pay the defendants' costs after that date so far as they were directly attributable to his being a party to the consolidated action. Judgment for the second plaintiff for £185 and costs except so far as the costs of the consolidated action were directly attributable to the first plaintiff's claim. Order for payment out to the first plaintiff of £180, to the defendants of £25 of the excess paid in, the remaining £20 to be dealt with according to the taxing master's certificate. Order for payment out to the second plaintiff of £125 in part satisfaction.

[EDITORIAL NOTE.] Persons whose right to relief arises out of the same transaction or series of transactions may be joined in one action as co-plaintiffs, but the rule does not say that they must be joined. That is in the discretion of the parties or their advisers. On the question of the payment out it is to be noted that there were necessarily two questions to be decided, for it did not follow that each plaintiff was entitled to the same damages or that either was entitled to damages having any relation to those awarded to the other plaintiff. The question of payment out and of costs, therefore, fell to be decided as though there were still two separate actions.

AS TO JOINDER OF PLAINTIFFS, see HALSBURY, 1st Edn., Vol. 23, Practice, p. 104, para. 183; and FOR CASES, see DIGEST Practice pp. 399-403, Nos. 1011-1050.

AS TO PAYMENT OUT OF COURT, see HALSBURY, 1st Edn., Vol. 23, Practice, pp. 149, 150, paras. 264, 265; and for CASES, see DIGEST Practice, pp. 486-489, Nos. 1643-1663.]

CONSOLIDATED ACTIONS for personal injuries caused by negligence of the defendants.

The two plaintiffs were both injured in the same accident in which a taxicab driven by the first defendant was caught between two tramcars owned by the second defendants. The actions were proceeded with separately until after defence delivered, when they were consolidated. Later the defendants admitted liability and paid into court, in the case

of the first plaintiff, a sum greater, and in the case of the second plaintiff a sum smaller than that ultimately awarded. The only contest was as to the form of order proper to be made in such a case.

F. W. Wallace for both plaintiffs.

Ernest Hancock for both defendants.

SINGLETON, J. : The circumstances are a little unusual. There were originally two actions started on the same day, May 4, 1936. In one the plaintiff was Michael English, in the other Joseph Siegenberg. Those actions were both in respect of personal injuries which each plaintiff claimed he had sustained in an accident on Mar. 20, 1936. Both plaintiffs were passengers in a taxicab belonging to the first defendant, Jack Bloom, which became caught between two tramcars owned by the second defendants, the London Passenger Transport Board. Both defendants admitted that they were negligent, and the only question was what damages the plaintiffs were respectively entitled to recover. It was suggested that only one writ should have been issued, but I see no reason why there should not be two writs. That must be left to the discretion of the solicitors, who in this instance were acting for both plaintiffs, and I know no reason why they should not issue two writs.

Separate statements of claim were delivered on May 25, and separate defences on June 6. On June 16 the matter was before me on a summons for directions, and at the request of the defendants it was ordered that the actions should be consolidated, and consequential directions were given. On July 6 the defendants made certain payments into court, with an admission of liability—in the case of English, £225, and in the case of Siegenberg, £125. The case was tried before me, and after hearing evidence, I gave judgment for English for £200 as damages, and for Siegenberg for £185 as damages. The amount recovered by English is thus £25 less than was paid into court in his case, while the amount recovered by Siegenberg is £60 more. The matter stood over so that counsel might see if there was any authority on the question of costs in such a case. Both tell me that they are unable to find any authority in point.

I have to bear in mind two things : (i) that the plaintiff who has succeeded and has recovered more than was paid into court should be in no way prejudiced by the position of the plaintiff who has recovered less than was paid in ; (ii) that the defendants in the case of English paid in more than he recovered and they ought to have the benefit of that payment into court. In my opinion, the proper form of order is as follows :

Judgment for the plaintiff Siegenberg for £185 and costs, including the costs of the consolidated action, except in so far as directly attributable to the claim of English after the date of payment into court. Order

payment out to the plaintiff Siegenberg of the £125 in court in part satisfaction.

Judgment for the plaintiff English for £200, and costs up to the date of payment into court. The plaintiff English to pay to the defendants any costs of the consolidated action arising after the date of payment into court, which are directly attributable to his being a party to the consolidated action. Order payment out to the defendants of £25 (part of the £225 paid into court by them in respect of the plaintiff English). Order payment out to the plaintiff English of £180, the remainder of the sum in court to be dealt with, according to the taxing master's certificate.

Solicitors : *S. Rutter & Co.* (for the plaintiffs) ; *Langford, Borrowdale & Thain* (for the defendants).

[*Reported by T. A. DILLON, Esq., Barrister-at-Law.*]

Re THORNBUR, CRABTREE *v.* THORNBUR.

[COURT OF APPEAL (Lord Wright, M.R., Romer and Greene, L.JJ.),
July 27, 1936.]

Will—Partial intestacy—Annuities charged on corpus—Accumulation of income of residue—Bequest of capital and income to children—No issue—Administration of Estates Act, 1925 (c. 23), s. 49.

The testator bequeathed to his mother an annuity which was to commence from the date of his death. Out of the income of the residue of the estate an income was to be paid to his widow. He also directed that the surplus income of the residuary trust fund was to be accumulated for the period of twenty-one years from his death or for the life of his widow, whichever was the shorter, and at the expiration of such period, the residuary estate, capital, income and accumulations, was to be held upon trust for his children. The testator died without issue. For the widow it was contended that the accumulations should cease and the surplus income be dealt with as income from the residuary estate undisposed of by the testator. For the mother of the testator it was contended that the surplus income should continue to be accumulated by reason of the words "subject to the provisions of the will" in Administration of Estates Act, 1925, s. 49:—

HELD : the surplus income should not be accumulated, but should be dealt with as income of the residuary estate undisposed of by the testator. The trust for accumulation was not to be considered as a provision of the will for the purposes of sect. 49, as it was part of a gift which had wholly failed.

[EDITORIAL NOTE.] Where a testator fails to make an effective disposition of part of his estate that part is held upon the statutory trusts for those entitled under the Administration of Estates Act, 1925, s. 46, "subject to the provisions of the will." This would seem to be better expressed as such provisions as remain operative and effective. Provisions relating to gifts which have failed must be considered as not remaining operative and fall with the gift that fails, and this is so whether the gift fails by natural causes, such as persons predeceasing the testator on failure of issue, or by actual disclaimer by a beneficiary.

AS TO APPLICATION OF STATUTORY TRUSTS TO PARTIAL INTESTACY, see HALSBURY, Hailsham Edn., Vol. 14, p. 373, para. 699; and FOR CASES, see DIGEST Supp., Wills, Nos. 299a, 299b.]

Cases referred to :

- (1) *Re Sullivan, Dunkley v. Sullivan*, [1930] 1 Ch. 84; Digest Supp.
- (2) *Re McKee, Public Trustee v. McKee*, [1931] 2 Ch. 145; Digest Supp.

APPEAL from a decision of BENNETT, J., given on Feb. 14, 1936, in which he held that in the events which had happened, and which are set out in the judgment of LORD WRIGHT, M.R., subject to proper provision being made for the annuity bequeathed to the testator's mother, the trustees ought not to accumulate the surplus income of the residuary estate, but that it ought to be dealt with as income from the residuary estate undisposed of by the testator.

Sir Gerald Hurst, K.C., and *Gerald Upjohn* for the testator's mother.

W. C. Cleveland-Stevens, K.C., and *C. E. R. Abbott* for the testator's widow.

Roger Turnbull for the trustees of the will.

LORD WRIGHT, M.R. : This case raises a short point upon the construction of a will. The testator made his will in 1933 and died shortly afterwards, leaving no issue. That is the essential fact in regard to the matters which we have to consider here. Under his will, the material matters to be considered are these : first of all, he bequeathed to his mother, Lettice Thornber, an annuity of £52, to be paid free of duty and income tax, commencing from the date of his death ; then he bequeathed to his wife, now his widow, Agnes Thornber, free of duty, his household furniture, and so forth, and he gave her the right to have the use and enjoyment of a freehold residence which he possessed. Then he dealt with the residue of his real and personal estate in the following way : he left his freeholds to his trustees in fee simple, and his personal estate to his trustees absolutely, with a direction to convert into money all such parts of his real and personal estate not consisting of investments of the nature authorised in subsequent parts of the will, and out of the moneys so arising and out of the investments the trustees were to pay or provide for the "debts, funeral and testamentary expenses and any legacy or annuity and the duties payable on," among other things, the annuity to his mother. Then the will proceeds "and subject thereto my trustees shall stand possessed of the residue . . . upon the following trusts," and then the first is "to pay out of the annual income thereof the sum of £10 per week to my said wife during her life," with a further provision to resort to capital if the income should be insufficient to pay it. Then comes the provision in respect of which these questions have arisen ; it is :

- 8 (b) Subject thereto my trustees shall invest and accumulate the income of my

residuary trust fund at compound interest by investing the same and the resulting income thereof as an accretion to the capital of my residuary trust fund during the life of my wife or for a period of twenty-one years from the date of my death (whichever period is the shorter) and at the expiration of such twenty-one years or at the death of my wife whichever shall first happen (hereinafter called the date of distribution) upon trust as to both capital and income and the accumulations of such income : (1) For all and every my children or my child (if only one) living at the date of distribution.

Then follow various ancillary provisions. The testator, as I have said, died leaving no child, he never had any children, and therefore as to the residuary trust fund dealt with in clause 8 (*b*) there was an intestacy, to which the Administration of Estates Act, 1925, s. 49 applies. The material words of that section are these :

Where any person dies leaving a will effectively disposing of part of his property, this part of this Act shall have effect as respects the part of his property not so disposed of subject to the provisions contained in the will.

The material section which applies here, that is to say, the section which determines what is to happen in the event of an intestacy, is sect. 46, of which I need only read the first part. Sect. 46 provides :

(1) The residuary estate of an intestate shall be distributed in the manner or be held on the trusts mentioned in this section, namely : (i) If the intestate leaves a . . . wife (with or without issue) the surviving . . . wife shall take the personal chattels absolutely—[in this case they were dealt with by the will]—and in addition the residuary estate of the intestate (other than the personal chattels) shall stand charged with the payment of a net sum of £1,000, free of death duties and costs, to the surviving . . . wife with interest thereon from the date of the death at the rate of £5 per cent. per annum until paid or appropriated—

and subject thereto (*a*) upon trust for the surviving wife during her life. Para. (*b*) has no application here. Now that being the position, the question has been raised whether the widow is entitled to claim that she has a beneficial life interest in the residuary estate and, that being so, whether she is entitled to claim the benefit of the income therefrom as being entitled thereto in full right, and the trustees have taken these proceedings in order to obtain the direction of the court as to whether that is so or whether or not they are bound to proceed to accumulate the income as an accretion to capital in the terms of clause 8 (*b*) of the will. The learned judge has held that they are not so bound. He has also dealt with the question of the £1,000 by declaring that the trustees shall provide for the annuity being payable to the defendant Agnes Thorner, that is to say, that the trustees are to pay her :

a sum of £1,000 out of the residuary estate of the said testator free of death duties and costs with interest at 5 per cent. from the date of his death and that such sum is presently payable.

That part has not been objected to, and I pass away from that, because that is not the real subject of this appeal.

Now it has been contended that the trustees are still bound to go on investing and accumulating the income of the residuary trust fund as an accretion to capital under clause 8 (b), and the argument was put on the words which are to be found in sect. 49 of the Act, "subject to the provisions contained in the will." It was said that though it is clear there is no disposition which is effective in regard to this residuary trust fund, so far as the fund was to be accumulated on trust for the children (and there never were any children) still there are certain provisions of the will which deal with this trust fund which must be fulfilled, even though the trust has entirely failed, and the disposition contained in the will has entirely failed, and although there is an intestacy as to this residuary trust fund within sect. 49. The learned judge has rejected that contention, and I agree with him. In my judgment, there is here no provision contained in the will to which the property which, in fact, was not effectively disposed of by the will, is subject. The provision in question cannot, I think, be dissected and it cannot be said, I think, that there is a clear and effective provision as to investing and accumulating the income as an accretion to capital when the purpose or object to which that investment or accretion is directed in the will has entirely failed and there is no effective disposition at all. In my judgment, the whole of this clause 8 (b) is a single provision governed by the purpose, namely, the trust which is specified, and, that having failed, there is, I think, no provision within the meaning of sect. 49 of the Act at all. That I understand to be the decision of MAUGHAM, J., in *Re Sullivan, Dunkley v. Sullivan* (1), a case which, in my opinion, involves the same principle as this case. Indeed, Mr. Upjohn has quite frankly admitted that the argument for the appellant here involves the contention that the decision of MAUGHAM, J., was wrong. The case there was this: a testator had disposed of the whole of his residuary personalty, including royalties in respect of copyrights, to his trustees upon trust to pay the income to his wife for life and after her death in trust for his children or remoter issue. The headnote continues:

He died without having had children, and the question arose whether, if the widow disclaimed her life interest under the will, royalties received by them in respect of copyright or other interests comprised in the estate would be income or capital.

And it was held that the widow, upon disclaiming, would become entitled to a life interest in the residue and would take the royalties as income, that is to say, upon disclaiming her right under the will to be paid the income, she would then be entitled to claim as being entitled to a life interest in the residue and she would, therefore, be entitled to claim the royalties as they fell in year by year as part of the income of that life interest to which she was beneficially entitled in the events that had

happened and under sect. 46, which I have read. MAUGHAM, J., puts the matter in this way at p. 87 :

The only question is whether the disclaimer will render inoperative for all purposes that part of the will which it affects. In the present case the provision as to royalties was inserted in the will in order to diminish the widow's life interest for the benefit of children who, in the event, do not exist. It was clearly not inserted in order to determine the nature of interests to be taken in property in respect of which he died or might die intestate.

Then he deals with the argument based on the words of sect. 49 and says :

It is true that the Administration of Estates Act, 1925, s. 49, might be construed to mean that the provisions of that part of the Act shall have effect subject to the whole of the provisions in the will, including any provisions which become inoperative by virtue of disclaimer, lapse, or other event. I am satisfied that that is not the true construction of the section. The phrase "subject to the provisions contained in the will" is intended to show that the provisions of the Act relating to property not disposed of by will must take effect subject to all the provisions of the will which remain operative and effective. In my view, therefore, the widow, upon executing a disclaimer, will be entitled to a life interest in the residue of the testator's estate, including royalties receivable by the trustees.

That applies here exactly, subject to the question of disclaimer. If the widow here disclaims her right to the annuity of £10 a week then there would be no distinction at all, but, in my opinion, that is a matter which is not important to the ultimate decision. The residue is, in any event, subject to the payment of the annuity to the mother of the deceased and the trustees are bound to make provision for that as a first charge, and in the same way the residue would be subject to the right of the widow to have her weekly payment of £10 provided for. If, however, she disclaims that right then she will be entitled without any further qualification, except for the provision for the mother of the testator, to have the income of the residue. In my judgment, clause 8 (b) of the will has become entirely and completely ineffective and cannot be regarded as being a "provision contained in the will," to which the widow's rights on an intestacy are subject. The case of *Re McKee* (2) which was referred to involves an entirely different question. It is set out by ROMER, J., in his judgment and I do not intend to refer to it further. I think the judgment of the learned judge was right and should be affirmed.

ROMER, L.J. : I agree. The first thing to be ascertained is what interest in the testator's estate remains undisposed of by his will. When we have that ascertained then by virtue of the Administration of Estates Act, 1925, s. 49, that interest will be held upon the trusts that are set out in sect. 46 of the Act. Sect. 49 obviously applies to a case where the testator has failed to dispose of some particular item of his property, but, it is plain, and it was so held in *Re McKee* (2), that it also applies to a case where the testator has disposed of the whole of his property, but has

failed to make effective disposition of every interest in that property so that as regards that interest it passes as on an intestacy. It was incidentally held in *Re McKee* (2), too—it was a chief point in the case but incidentally it was held—that in such a case the trust for sale imposed by sect. 33 in part III of the Act had no application to the interest so disposed of; it was dealt with on the trusts set out in part IV of the Act, and therefore, in a case like the one with which the court was dealing there, the section had precisely the same effect as though into the will one were to read the disposition set out in sect. 46 of the Act. It is not true to say that that is the result of sect. 49 in all cases.

Now as I have said, the first thing to be ascertained is what interest in the testator's property has been undisposed of by his will. I will not read the will again; it has been already read by LORD WRIGHT, M.R. It is sufficiently plain that, subject to the annuity to the mother and, of course, other legacies and so forth, and subject to the annuity to the widow, the testator's residuary estate is undisposed of and that the accumulation directed by the will is an accumulation directed solely for the purposes of his ultimate residuary gift to his children and fails with that gift. Sir Gerald Hurst in the course of his argument agreed when I asked him whether before the Act the next of kin could not have insisted upon receiving the surplus income after the two annuities had been disposed of from year to year, and, of course, he had to agree that that was the case; the next of kin would have been entitled to claim that income as being income undisposed of by the will. It follows that under sect. 49 the income and the corpus of the residue will now be held upon the trusts set out in sect. 46 and that the trust for accumulation has no application whatsoever. Sir Gerald Hurst and Mr. Upjohn both very strongly relied upon the words to be found in sect. 49 of the Act, "subject to the provisions contained in the will," and they said that this direction to accumulate was one of the provisions contained in the will to which effect must be given having regard to those words in sect. 49. I agree again, but when you have ascertained what interest has been undisposed of by the testator you then look at the will to see whether as regards that interest he has given any directions, and, if he has, those directions must be attended to. For instance, it is conceivable that a testator, bearing in mind the provisions of the Administration of Estates Act, would insert a direction something to this effect in his will: "In the event of any of my property being undisposed of by this my will and the provisions of sect. 49 taking effect I direct that any such property shall be disposed of" in a particular way, or it might be any other direction so long as it was not a direction dealing with beneficial interests in the property. Of course, if by his will he dealt with any beneficial interests in his property then those interests would take effect under the will, not under this section; but the provisions in the testator's will relating to accumulation

are not provisions relating to any interest of which the testator had failed to dispose.

In my opinion, the decision of BENNETT, J., was right.

GREENE, L.J. : I agree.

Appeal dismissed. Costs to be paid out of the estate.

Solicitors : *Williamson, Hill & Co.*, agents for *Clarkson, Thomas & Collinson*, Halifax (for the trustees and the widow) ; *Robbins, Olivey & Lake*, agents for *Longbothams & Bradley*, Hebden Bridge (for the mother).

[*Reported by H. P. LANSDALE-RUTHVEN, ESQ., Barrister-at-Law.*]

Re RIDDELL, PUBLIC TRUSTEE v. RIDDELL.

[CHANCERY DIVISION (Farwell, J.), July 8, 9, 1936.]

Will—Gift of freehold property—Purchased during last illness of testator—Balance of purchase money advanced by solicitor—Deeds handed to solicitor—Charge—Gift cum onere—Administration of Estates Act, 1925 (c. 23), s. 35.

Will—Annuities—Appointment of Public Trustee as trustee—Incidence of income fee.

Prior to his death, the testator entered in a contract to purchase certain freehold property and paid a deposit. He then became ill and was quite unable to attend business matters, and there was no one with authority to sign cheques upon his banking account. In these circumstances the bank opened a special account in the name of the testator's solicitors, advanced a sufficient sum to that account to meet the payment, and the solicitors received and held the title deeds of the property. By his will the testator devised this property to his wife :—

HELD : (i) the result of the above transactions was that the property became charged in favour of the solicitors with the amount of the balance of the purchase money ;

(ii) the testator's wife took the property, subject to that charge.

Certain repairs of the property were, with the approval of the testator, carried out, but not paid for during his life-time :—

HELD : (iii) the cost of these repairs was a debt of the testator and should be discharged by the executors out of the estate.

The testator gave his wife an annuity of £8,000 per annum during her life and certain other annuities to a large number of persons, and he appointed the Public Trustee to be one of the trustees of his will :—

HELD : (iv) the income fee of the Public Trustee is one of the expenses of administration and is not to be paid out of the portions of the estate which have been given before the residue is disposed of, and, therefore, not to be paid out of the annuities.

[EDITORIAL NOTE.] The difficulty that has arisen in the first point might have been avoided by advancing the money in such a way that it did not become a charge upon the property. It would have been quite possible to have advanced the money so that it became, as the costs of the repair was held to be, a mere personal debt of the testator and would have been payable by the executors as a debt in the ordinary way. On stating this, no suggestion is made of carelessness on the part of anyone. Upon the question of the incidence of the income fee of the Public Trustee, the case of *Re Bentley* (1) was not followed, and the judge thought that the brevity of the report has led to its being misunderstood.

AS TO GIFTS *cum onere*, see HALSBURY, Hailsham Edn., Vol. 14, pp. 380-384,

paras. 709-712; and FOR CASES, see DIGEST, Vol. 23, pp. 488, 489, Nos. 5557-5573. AS TO REMUNERATION OF PUBLIC TRUSTEE, see HALSBURY, 1st Edn., Vol. 28, Trustees, p. 219, para. 451; and FOR CASES, see DIGEST, Vol. 43, p. 1035, Nos. 4761, 4762. FOR THE PUBLIC TRUSTEE (FEES) ORDER, 1926, see ENCYCLOPÆDIA OF FORMS AND PRECEDENTS, 2nd Edn., Vol. 19, pp. 839-845.]

Cases referred to :

- (1) *Re Bentley, Public Trustee v. Bentley*, [1914] 2 Ch. 456 ; 43 Digest 1035, 4761.
- (2) *Re Hicklin, Public Trustee v. Hoare*, [1917] 2 Ch. 278 ; 43 Digest 1035, 4762.
- (3) *Re Hulton, Midland Bank Executor & Trustee Co., Ltd. v. Thompson*, [1936] 2 All E.R. 207 ; Digest Supp.

ADJOURNED SUMMONS for the determination of questions arising out of the will of the Right Hon. George Allardice Baron Riddell, who died on Dec. 5, 1934.

By his will, which was dated Aug. 10, 1934, the testator appointed his wife, the Right Hon. Annie Molison Riddell, Baroness Riddell, the first defendant, and the Public Trustee, to be the executors and trustees thereof, and, after bequeathing certain specific and pecuniary legacies including a legacy of £100,000 to his wife, he also gave to Lady Riddell his freehold houses and grounds, known as Walton Heath House, and "The Island," respectively, together with certain leasehold premises and his furniture and household effects not otherwise disposed of. The testator had acquired the house known as "The Island" only a short time before his death, and the circumstances surrounding its purchase gave rise to certain difficulties described in the judgment, and to a resolution of which questions 2 and 4 of the summons herein were directed. These questions were as follows :

2. As to the specific gift in clause 2 of the will to the first defendant of the freehold property known as "The Island" and of the contents thereof which formed part of the testator's furniture and effects whether the first defendant takes such items subject to all or some and what part of the moneys borrowed in the testator's lifetime from the National Provincial Bank Ltd. for the purpose of completing the purchase of such items and to the interest on such moneys or free from such sums and interest.

4. As to the alterations in or additions to the said premises known as "The Island" which were in course of being made at the testator's death, whether the whole of the expense of these were and are payable out of the residuary estate, or whether all or any and what part of the same ought to be debited against the first defendant as devisee of such premises.

Wilfrid M. Hunt for the plaintiff.

J. Neville Gray for the first defendant, the testator's widow.

C. R. R. Romer for the second defendants, the Royal Free Hospital, which claimed to be interested in the testator's residuary estate.

Cyril J. Radcliffe, K.C., and *G. D. Johnston* for the third defendants,

the Printers' Pension Almshouse and Orphan Asylum Corporation, who claimed to be interested in the testator's residuary estate.

A. Andrewes-Uthwatt for the Attorney-General.

J. W. Manning, K.C., and *C. R. D. Richmond, J. L. Stone* and *M. K. Haskell* for various classes of employees, who claimed to be interested as pecuniary legatees.

H. B. Vaisey, K.C., and *Gerald Upjohn* for the last defendants, the Newspaper Press Fund, the Solicitors' Benevolent Association, and the Solicitors Managing Clerks' Association, all of whom claimed to be interested in the testator's residuary estate.

J. Neville Gray, for the first defendant, Lady Riddell: The testator's manager, Mr. Giles, had a sufficiently wide authority to deal with matters of ordinary business on the testator's behalf to cover what was done here. Mr. Giles and the solicitors have merely done what the testator would have done himself if he had been able, in which case these sums would not have been charged on the property, but would have been paid out of the testator's ordinary account which was in credit. The liability is therefore a liability of the estate, and is entirely unsecured.

But there can be no charge in favour of the solicitors for the reason that there was no lien for unpaid purchase money, because there was no purchase money unpaid. The solicitors had no authority to retain the documents of title against the testator. Solicitors cannot give themselves a charge over their clients' property merely by retaining title deeds which have come into their possession, as happened in this case, on their clients' behalf as his solicitors in the purchase of property. The fact that the solicitors wanted the bank to take the documents of title shows that they did not consider that they had any lien on them.

With regard to the repairs, these were clearly within the general authority of Mr. Giles. But it is not necessary to rely on that general authority, as it is plain from the evidence that the necessity for the whole of the work was explained to the testator and that he expressly authorised the expenditure in question.

C. J. Radcliffe, K.C., for the Printers' Pension Fund, one of the residuary legatees under the testator's will: The effect of the arrangement was that as between the bank and the solicitors the solicitors owed the bank some £5,000. Even apart from the arrangement, which was in fact made, the testator would have been liable to reimburse the solicitors. In those circumstances, the solicitors, having the title deeds in their hands and not having made any statement of their intention to waive their lien, were entitled to a charge on the property in respect of the money which they owed to the bank on behalf of the testator. As the solicitors did not waive their lien they would have been entitled to refuse to hand over the deeds to the testator, on the ground that they had

only obtained possession of them by making themselves liable to a third party for £5,000 and that they were entitled to retain them until the £5,000 was paid. That being the position, the Administration of Estates Act, 1925, s. 35, applies.

H. B. Vaisey, K.C., for the Newspaper Press Fund, another residuary legatee under the testator's will: It is necessary not to allow the legal position to be obscured by the fact that testator was so wealthy, that there could be no doubt that the money would be paid. This is a matter which depends on statute. The Administration of Estates Act, 1925, s. 35, is very definite in its terms. If the solicitors considered themselves in a position to hand the title deeds to the bank, it hardly lies in their mouth to say that they were not subject to a lien.

The remaining questions of the summons were directed to difficulties arising out of the construction of the testator's will, with the exception of question 7, which was inserted after leave had been given to amend the summons by its inclusion, and which was as follows:—

7. Whether the proportion of the Public Trustee's income fee payable in respect of the income required to discharge: (a) the annuity bequeathed to the first defendant, and (b) the other annuities bequeathed by the testator, ought to be borne (i) by such annuities respectively, or (ii) by the income or capital of the residuary estate.

J. Neville Gray for the first defendant, the testator's widow: No part of this fee ought to fall on the annuities. There are two decisions of *ASTBURY, J.*, on this point, *Re Bentley, Public Trustee v. Bentley* (1), and *Re Hicklin, Public Trustee v. Hoare* (2), which are rather inconsistent. In these circumstances the court is not bound by the earlier one. In the later one it was held that annuities were given as clear annuities free of the Public Trustee's fees, which is the way the matter was treated by *CLAUSON, J.*, in the recent case of *Re Hulton, Midland Bank Executor & Trustee Co., Ltd. v. Thompson* (3).

H. B. Vaisey, K.C., for the Newspaper Press Fund: Although *CLAUSON, J.*, did not like the decision in *Re Bentley* (1) that case has been consistently followed.

G. D. Johnston for the Printers' Pension Fund: The fact that this is a case of the Public Trustee, distinguishes it from *Re Hulton* (3). The Public Trustee rules are different from what they were when *Re Bentley* (1) and *Re Hicklin* (2) were decided: Public Trustee (Fees) Order, 1926, r. 10. The provision that the Public Trustee can agree with the person receiving income to vary his fee would be an extraordinary one if the fee were payable by third parties, that is, the persons entitled to residue. See also rules 11 and 12. The result of these rules taken together is that the income fee of the Public Trustee is a percentage of the amount which he collects and distributes to the beneficiary. Any other construction would mean that the distribution of

residue would have to be held up indefinitely until the annuities ceased.

FARWELL, J. : The first two questions which I have now to determine arise under these circumstances. Prior to the testator's death, he entered into a contract to purchase certain freehold property, known as "The Island," and that property by his will he gave to Lady Riddell, it being included in his gift to her of "my freehold houses and grounds, known as Walton Heath House and "The Island" and so on. With regard to the first of these two questions, a contract was entered into for the purchase of this property and a deposit was paid. Certain furniture also was purchased and at the time of completion there was due in regard to the house and furniture a sum of £5,806 3s. 6d. In the ordinary course of things, Lord Riddell would have paid that sum, and the whole matter would have been completed. Unfortunately, however, at that time Lord Riddell was seriously ill, and quite incapable of attending to any business at all. Payment was being pressed for, and there was an obvious difficulty, because although the testator had a manager, a Mr. Giles, who was his general business manager upon wide and somewhat vague terms, he had no authority to draw cheques upon the account of the testator, nor had anyone else. The position, therefore, was one of some little embarrassment, because money had to be found to enable the sale to be completed. In those circumstances, Mr. Giles consulted with the testator's solicitors and they went to the testator's bank to see whether some arrangement could be made for the advance of the money in question. The arrangement which was made was this : the bank agreed to open a separate account and to advance to that separate account sums up to £6,000, and they agreed that so long as the current account of the testator exceeded the sum owing on the special account they, the bank, would charge no interest—but the loan was a loan made, in form at any rate, to the solicitors.

The money having been secured in that way the transaction for the sale of "The Island" was completed and the title deeds were handed to the solicitors. The solicitors, as I have said, were the testator's solicitors, and it may well be that in any event they would have received the title deeds as his solicitors for safe custody. Their position, however, as the result of the above transactions was this. They had made themselves personally liable to the bank for the amount advanced by the bank, and although they were looking, of course, to Lord Riddell to pay the bank, or to pay them, and thus relieve them of all liability, and although, apart from any possibility of Lord Riddell's death the risk was absolutely negligible, because everybody knew that Lord Riddell would find the money when he was in a condition to do so, there is no doubt on the evidence that in the meantime the bank was entitled to look to the solicitors for repayment of the money. The solicitors having found the

money which enabled the purchase to be completed, and having got the title deeds in their possession, in my judgment could not have been compelled by Lord Riddell to part with those title deeds unless and until their liability had been discharged; in other words, they had, in my judgment a lien on the title deeds as security for the amount which they were owing to the bank on this account.

The solicitors, as the evidence shows, endeavoured to get the bank to take the title deeds, with the idea, I suppose, that the bank would have a charge on the property, and would thus relieve them to that extent of their own personal liability. The bank, however, was not willing to do that, but preferred that the solicitors should retain the title deeds.

In my judgment the result of what happened must be that the solicitors had a lien on the title deeds which was, in fact, a lien which they could have enforced against Lord Riddell had he been alive and made a difficulty about paying the money, and if that difficulty had arisen, under the law as it stands, it is plain that the lien was a charge which must be borne by the person to whom this property has been given by Lord Riddell's will, namely, his widow. It may be that it is an unfortunate position from her point of view. If Lord Riddell had recovered, or had lived a little longer, there would have been no doubt about the matter and she would then have got this property without any charge at all; but I am bound to apply the law as it is, and in my judgment, if I am to apply the law strictly, the only conclusion to which I can come on this question is to say that the property which Lady Riddell takes is charged with this amount.

In regard to the other question, the position is quite clear. This second question relates to certain repairs which had been done to the property. Mr. Giles, the agent, who had wide authority, authorised the doing of these repairs, but the evidence shows that Lord Riddell was perfectly well aware of what was being done in regard to the matter, and approved of it. There is no doubt that Mr. Giles had authority for this purpose to authorise the work in question to be done, and it was done, and expense was thereby incurred. Since Lord Riddell died, no further liabilities in respect of the work have been incurred, which shows that the amount due in respect of those repairs was all in respect of work done prior to the testator's death. Under those circumstances, in my judgment, it is perfectly plain that that is a debt which the testator owed and which his executors are liable to pay, and I can see no possible ground for suggesting in that case that the legatee is under any liability at all in regard to the matter.

Wilfrid M. Hunt: It now appears that the contents of "The Island" were sold by auction on Dec. 4 and 5, 1934, for the sum of £105 10s. 2d., the testator dying on Dec. 5. Lady Riddell, therefore, will not receive

these contents under the bequest to her of the testator's furniture, and it seems rather hard on her that she should take the house, subject to a charge in respect of the purchase price of the contents as well as the house.

FARWELL, J. : I should have thought it would have been reasonable to treat the furniture as not passing under the gift at all. I am willing that my declaration should be limited to the proceeds of sale of the house. The question I have now to decide is whether the proportion of the Public Trustee's income fees payable in respect of the income required to discharge : (a) the annuity bequeathed to the first defendant, and (b) the other annuities bequeathed by the testator, ought to be borne : (i) by such annuities respectively, or (ii) by the income or capital of the residuary estate. The testator gave an annuity of £8,000 a year to his wife during her life, and he also gave certain other annuities to a large number of persons, and he appointed the Public Trustee to be one of the trustees of his will. The Public Trustee is entitled under Act of Parliament to charge and be paid a fee which is calculated upon the capital, and he is also entitled to an income fee calculated on the income of the estate. The provision of those payments is a provision which in my judgment is one of the expenses of administration, or part of the expenses of administration, and must, *prima facie*, at any rate, be paid out of the estate, but not out of the portions of the estate which have been given before the residue is disposed of. The annuities are given, and must be provided for, and no doubt an income fee must be paid, but in my judgment there is no ground for suggesting that those annuities must bear any part of the Public Trustee's income fee, and I propose to decide accordingly.

It is pointed out to me that ASTBURY, J., in the case of *Re Bentley* (1), seems to have come to a different conclusion. With the greatest possible respect to that judge, I am unable to take the same view as he did in the matter. The judgment in the case of *Re Bentley* (1) is very shortly reported, and it may be that the whole matter does not appear in the report. But however that may be, I am unable to agree with the learned judge's conclusion in that case. That decision is not binding upon me, and I must very respectfully differ from it. I therefore propose to declare that the income fee of the Public Trustee is not payable out of the annuities.

Solicitors : *Smith, Rundell, Dods & Bockett* (for the plaintiff, the first defendant, and certain pecuniary legatees) ; *Hyde, Mahon & Pascall* (for the second defendants) ; *Hurford & Taylor* (for the third defendants) ; *Treasury Solicitor* (for the fourth defendant) ; *Canter, Hellyar & Co.* (for certain pecuniary legatees) ; *Shaen, Roscoe, Massey & Co.* (for certain pecuniary legatees) ; *W. F. Gillham* (for the last defendants).

[Reported by C. M. YOUNG, Barrister-at-Law.]

Re WEST OF ENGLAND ROAD METAL COMPANY, LTD.

[RAILWAY AND CANAL COMMISSION (MacKinnon, J., Sir Francis Taylor and Sir Francis Dunnell), July 17, 20, 21, 22, 23, 24, 1936.]

Mines and Minerals—Quarry—Grant of rights over adjoining fields—Reasonable offer and refusal—Extent of jurisdiction—Mines (Working Facilities and Support) Act, 1923 (c. 20), ss. 1, 3, 6, 9.

A company quarrying granite wished to acquire adjoining fields ultimately for the purpose of quarrying the granite under them and immediately partly for the reason that there was a danger of fine stones from blasting operations doing damage on those fields. The company upon approaching the apparent owners, were told the real owner was a Mrs. M., to whom they made an offer to purchase the property at £2,650. The offer was refused, Mrs. M. naming a purchase price of £6,750. Subsequently, they discovered that she was a mere nominee for certain persons who had been servants or officers of the company, and these persons were joined as respondents. It was stated by the respondents that they were about to develop these fields by the building of bungalows. The company applied under the Mines (Working Facilities and Support) Act, 1923, for a compulsory purchase order in respect of these fields, but as this was beyond the provisions of the Act, the application was amended to ask for a right to work the minerals and such subsidiary rights as might be necessary:—

HELD: (i) the application to the owners to purchase the land was, in the circumstances of a quarry, a sufficient compliance with the statutory requirement that application must be made to the owner for the right to work the minerals, as the working of the quarry would so destroy the surface that it would be useless for any other purpose.

(ii) the offer had been unreasonably refused.

(iii) there was a danger of the minerals being left permanently unworked, because, (a) the company were the only people likely to work them, and (b) the owners were minded to build bungalows on the fields.

(iv) the employment by the company of a considerable number of men made the working of these minerals a matter of national interest.

(v) although the minerals under the fields would not be worked in the immediate future, it was reasonable for the quarry owners to look some years ahead and acquire mineral rights in adjoining fields.

[EDITORIAL NOTE. The feature of this case is that it considers in some detail the application of the Mines (Working Facilities and Support) Act, 1923, to quarries. There are considerable and important differences between underground workings and quarries, and as the Act in its terms is directed mainly to underground workings, its application to quarries is a little involved and that gives added importance to the judgment in this case.

AS TO THE MINES (WORKING FACILITIES AND SUPPORT) ACT, 1923, see HALSBURY Supp., Mines, para. 1301; and FOR CASES, see DIGEST, Vol. 34, pp. 635, 636, Nos. 321-327; and FOR THE ACT ITSELF, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 12, p. 181.]

APPLICATION by the owners of a quarry for the grant in respect of fields adjoining the quarry of the land with all necessary mining rights and for an order granting and vesting in them the land the subject of the application. The applicant company were the owners of a quarry at Porthoustock in Cornwall, and having worked out most of the granite

upon the land already in their possession, were anxious to acquire adjoining fields. Upon approaching the apparent owners in 1935 they were told that the then owner was a Mrs. Martin. In fact Mrs. Martin was a nominee for the actual owners, who were persons who had been connected with the company as secretary, auditor or otherwise. It was suggested that these people had bought up the fields adjoining the quarry in order to re-sell them to the company at a higher price. The owners themselves put forward a scheme for building bungalows upon the property and developing it. They refused to sell for less than £6,750, and the company refused to offer more than £2,650, i.e., £500 more than the then owners had paid for it. Whether the owners were guilty of a breach of duty towards the company, as having bought this property while they were servants or officers thereof, was not material to the decision in the present application, though whether they had a *bona fide* intention of developing the land was material in considering the question whether the offer of the company to purchase had been unreasonably refused. The application being in the nature of an application for a compulsory purchase order was one beyond the statutory powers of the commission to grant, and was by leave amended as stated in the judgment.

Edward Terrell for the applicants.

A. T. Miller, K.C., and *G. J. Paull* for the respondents, Elliott, Brown, Russell and Dunn, the beneficial owners of the adjoining fields.

A. Capewell for the respondents, Mr. and Mrs. Martin.

MACKINNON, J.: This is an application by the West of England Road Metal Company, Ltd., under an Act of Parliament of 1923, called the Mines (Working Facilities and Support) Act. The material passages in that Act are these: first of all, sect. 1 (1):

Where there is danger of minerals being left permanently unworked, by reason of the minerals for various reasons not being capable of being worked and including not being capable of being worked without the concurrence of two or more persons,

a right to work the minerals may be conferred in the manner and subject to the provisions hereinafter appearing.

Then sect. 3 provides for the granting of ancillary rights to facilitate the working of the minerals. Sect. 4 provides that a right to work the minerals shall not be granted:

unless it is shown that it is not reasonably practicable to obtain the right in question by private arrangement for any of the following reasons—

and then, among other things:

(d) that the person with power to grant the right unreasonably refuses to grant it or demands terms which, having regard to the circumstances, are unreasonable.

Sect. 6 provides for the reference of a claim under this Act to this tribunal and a requirement that this tribunal shall be satisfied as to certain things. Sect. 9 provides for compensation where any such right to work the minerals is granted and in particular provides that :

(2) The compensation or consideration in respect of any right . . . shall be assessed by the Commission on the basis of what would be fair and reasonable between a willing grantor and a willing grantee, having regard to the conditions subject to which the right is or is to be granted.

The applicant company own a quarry at Porthoustock in Cornwall, which they have been working for many years. There is a large gash in the face of the northern headland near the Manacles, where their quarry has been dug out of the hill. The face of that quarry has by reason of their operations been gradually advancing towards the south. South of the quarry there are various fields. The three fields immediately adjacent to the land already possessed by this quarry company are fields 1722, 1734, 1735 and 1787. In May, 1935, the top of the face of the quarry had got to within about 55 feet at the nearest point of field 1722, to 110 feet from the other corner of field 1722, and about 125 feet from the corner of field 1734. In the month of May, 1935, Mr. Nalder, the chairman of the company, in his evidence, said the directors thought that the quarry face was getting too near these fields and that the time had come when they ought to acquire them—too near partly because they would in due course want to dig away the top and underlying minerals under these fields and also because the nearer they approached the fields the greater the danger of some fine stones from the blasting operations being projected on to fields not in the possession or occupation of the company. Accordingly, in May, 1935, he instructed their manager, Mr. Steed, to go round and see whether he could buy fields 1722, 1734, 1735 and 1787. So far as they then knew the three first-named fields belonged to a farmer named Sowell, and the fourth field, 1787, belonged to a Mrs. Tettenborn. On making inquiries, Mr. Steed found that these supposed owners were no longer the owners, that they had recently sold them to, as he was informed, a Mr. Martin. Accordingly, Mr. Steed went and interviewed Mr. Martin and had certain correspondence with him. The upshot of that was that Mr. Martin informed him that his wife had bought these fields, that they were engaged in a scheme for erecting bungalows and that they would not sell them to the company for less than £6,750. The company and Mr. Steed were entirely ignorant of the fact at that time that Mrs. Martin was a mere nominee. In truth these three fields had been bought by Mr. Dunn [who had been up to a time immediately prior to this purchase, the secretary of the company] for a price of £2,150. [His Lordship reviewed the evidence.] The position, therefore, is that in Oct. 1934, these fields were bought by Mr. Dunn for £2,150. The com-

pany came and asked him to sell them. I have said that they came and asked him to sell them, and I say that in substance that was an application to obtain the right to work the minerals in and under that land. I should have added one matter which I think is not without significance, namely, that Mr. Martin, acting on behalf of Mr. Dunn, tried to buy various other fields, and various other fields contiguous to those which Mr. Martin did successfully buy, including field 1719, and actually, I think, including field 1723, which in fact belongs to the company. It is not without significance that the gentleman, Mr. Rogers, to whom those applications were made, said he would not entertain them, that they looked to him very much like hedging in the quarry. I think that is what Mr. Dunn was doing. By purchasing 1722, 1734, 1735 and 1787, he was hedging in the quarry and he meant to hedge in the quarry.

Those, I think, are all the material facts, but there remains the matter which has given me the greatest difficulty in this case, and that is this. This Act, as I have pointed out, is one under which an applicant may apply for and be granted the right to work minerals. In their application to the Board of Trade they state that they ask for an order granting them the land with all necessary mining rights. In regard to a quarry, which desires not merely to win the minerals by extracting the minerals underneath the surface but in the nature of things desires to dig the surface off and throw it away (which is from a quarry point of view of no use) and dig away underneath it, in effect a right to work the minerals becomes almost equivalent to the ownership in fee simple of the land, because it is a right to destroy the land and dig down to the lowest possible depth. As I have said, the right to be granted under the Act is a right to work the minerals. They have asked in the application to the Board of Trade for a grant of the land with all necessary mining rights, and in the prayer to the present application they say "The applicants ask for an order as against" these respondents "granting and vesting in them the land the subject of the application." I do not think this court has any jurisdiction to grant or vest in them the land: it has only a jurisdiction to grant a right to work the minerals, although, as I have said, if you are granting a right to work minerals by means of quarrying you are in effect doing the same thing as granting them the fee simple of the land. But in form it is only a right to work the minerals. I suggested to Mr. Terrell—it is a matter of words more than anything else—that he could not be granted that but I thought it proper that he should be entitled to amend that passage in the application by asking for a right to work the minerals. It might be in the form:

right to work the minerals in the said land, together with a right to occupy, let down and remove the surface thereof.

That difficulty as to the form of the application is, I think, a mere

formality and one that ought not to stand in the way of relief to the applicants.

Mr. Miller takes a further point and it is rather a formidable one. He says that this Act only deals with the right to work minerals, and under sect. 4 you can only get that right if you can show that you have applied for that right to the owner and attempted to get it by offering a reasonable sum and that that has been unreasonably refused. Mr. Miller says that they never did apply to Mr. Martin as the supposed owner for a right to work the minerals, that all they did was to make an offer to Mr. Martin to purchase the land, and therefore, under the terms of sect. 4, they not being in a position to show that they have ever asked for a grant of this right but have only asked to purchase the land, they are not in a position to establish that that right has been refused. I have dealt incidentally with that at an earlier stage. I think in substance that, whatever the language used, that which was being asked for of Mr. Martin was in substance a right to quarry this land, that is, to win the minerals. I have pointed out that, inasmuch as by working the quarry you destroy the land, you remove the surface and get everything underneath it as far as you possibly can, in effect it would deprive the vendors ultimately of every conceivable benefit in the land, and the term, therefore, which they used may have been that they asked to buy the land. But in substance, having regard to the correspondence and interviews that took place, I think they did apply to Mr. Martin for a right to work these fields and he did refuse.

There are two further points. First of all, we must be satisfied that the applicants have established that there is a danger of these minerals being left permanently unworked; secondly, that it is in the national interest that they should be given the right to work them. As regards the first, I am quite satisfied that nobody except the applicant company will or ever can work the granite under these fields. Right at the beginning of the case we heard evidence about it. They now load the stuff that they get out of the existing quarry at a landing jetty on the north side of this quarry. It is practically impossible to get the stuff away anyhow except by the sea, by loading it into small boats at some such landing jetty. I am quite satisfied that it would be quite impracticable to create another jetty at any other point except that. Therefore I am satisfied that nobody except this company could ever work the granite under these fields. That being so, I think that that requirement is satisfied. As regards the rest, the company are employing a considerable number of men. They say—and I see no reason to believe that they are inaccurate—that they hope and expect to develop this quarry to the south very considerably and to employ a considerable number of additional men. It was stated, I think, somewhere in the evidence that this is the only industry in the neighbourhood, and it

employs a great number of men. In that sense I think it is in the national interest that it should be worked.

There is only one other thing with regard to that which I think I ought to mention. It is clear that this quarry at the rate which it is likely to be worked, if the most sanguine expectations of increased output are fulfilled, will not advance southwards at a very rapid speed. It may be some little time before the minerals in these fields 1732 and 1734 are actually quarried out and disposed of. But as I have pointed out it is getting very near, within 5 feet at the nearest point and 110 feet and 125 feet at other points. I do not think it is unreasonable for a quarry to look a little way ahead as to provision for the further expansion of its area of working. It is said, and we have had evidence, that by working away at other parts of the land which they have got already, by digging out the beach or, rather, the sort of shell which now forms the lower base of this quarry, digging it down to below sea level, they could get an enormous quantity of stone apart from what they have got already. But I am satisfied that that is purely theoretical, it would not be a practical way of working the quarry. Incidentally, it would mean working below sea level and it would mean, quite apart from the sea, a great amount of pumping to keep the water out of the vast hole which would be created. Therefore I think the applicants have established their right to the relief which, on proper terms, they are entitled to ask for.

There remains the question under sect. 9 of what should be the consideration or compensation. The question is what would a willing buyer and a willing seller fix the price at? They offered £2,650, that is £500 on what Dunn had given for it, or what they supposed Martin had given for it. I am content to take that as being that which a willing buyer would give and I think that if Mr. Dunn, Mr. Elliott and Mr. Russell had been willing sellers that was the reasonable price they would have accepted. Therefore I think that should be the consideration or compensation.

The result is that I think there should be an order in these terms: the applicants to be granted the right to work the granite in or under the fields Nos. 1722, 1734, 1735 and 1787, with the ancillary right to occupy, let down and remove the surface thereon in the reasonable and proper development and extension of their quarries. The applicants further to have the ancillary right to carry on their quarrying business at their existing quarry or in the said fields without being liable to any claim by the owners of the said fields for nuisance by the falling of stones caused by blasting, by noise or otherwise; the compensation to be paid to the respondents for the granting to the applicants of all the above rights to be the payment to the respondents of £2,650; the costs of the applicants to be paid by the respondents Martin, Dunn, Russell and

Elliott, but the respondent Brown not to be liable for any of such costs.

I would point out incidentally that, of course, as we can only grant the right to work the minerals, it leaves the fee simple in the respondents, and as they are satisfied that there is no possible danger from stones or anything from this quarry and they seem to be confident that they would make a great deal of money out of these bungalows and Mrs. Tettenborn's bungalow, until the quarry in its normal working has been advanced so as to encroach upon these fields it will be perfectly open to them to continue with this holiday bungalow scheme.

The only other thing I will add is that a great deal has been said by Mr. Terrell about the impropriety or breach of contract by Mr. Dunn while in the service of and under contract with the company in acting as he did. As to that aspect of it or as to any claim that the company may have against Mr. Dunn for breach of his contract, we have nothing to do and nothing that I have said can in any way affect or prejudice either of the parties in regard to any proceedings that either of them might be advised to take.

SIR FRANCIS TAYLOR, K.C. : I agree in the form of order which my Lord proposes, and I should like to say that I feel some doubt, although I have made up my mind about it, about the important point which Mr. Miller raised as to the absence of a condition precedent to our jurisdiction arising under the terms of sect. 4, that is as to the absence of evidence of an unreasonable refusal. It has to be remembered that in administering this statute we are administering compulsory powers and, in my view, everything must be strictly complied with before these powers are exercised. If the attention of the tribunal is limited to the correspondence to which Mr. Miller referred, I am inclined to think that he would be in the right in making that submission and that it is a submission which ought to have been acceded to, but after considering the matter and being referred to the contemporary conversations with Mr. Steed, I think the right thing is to consider that correspondence as read in the light of the oral evidence, and I think in substance both parties knew that what the letters were about, and certainly what the conversation was about, was about the granite and the right to work it. I have said it may be doubtful, but I have come to the conclusion that that is the right way to read that correspondence, and, if it is right, then there is within the terms of the statute a refusal which we hold to be unreasonable.

On the question of this alleged conspiracy, I agree with my Lord. I think he has expressed the view that there is no evidence of a conspiracy to purchase the land secretly. When Mr. Dunn, in Nov. and Dec., 1934, made these two contracts and paid the two deposits, in my opinion he had a mixed notion in his head of what he was going to do

with this land. I think he had an idea that the company, either because they feared actions for nuisance or because they might at some day want to work it, might buy it; and alternatively, or perhaps if that failed, then he might develop it for some plan of selling plots or bungalows. I think probably it was for that reason that he arranged to purchase through Mr. Martin as a nominee. It is impossible to say that Mr. Russell knew nothing about it; there is no evidence about that or as to what idea Mr. Russell really had in his mind, and I am not satisfied as to that. Nor am I satisfied that Mr. Elliott had an idea or what his idea was when he first came in on Dec. 19. But one of the most important incidents in this case to my mind is that which took place upon Jan. 11, 1936, when all the syndicate, except Mr. Brown, who had not then come in, were met together for the express purpose of discussing the Board of Trade circular, the purport of which was to discover who was concerned in this land or interested in it in order to see whether negotiations could avoid the necessity of reference to this court. That was discussed for an hour and a half, and in the presence of Mr. Elliott, who would thoroughly understand. Certainly I am satisfied that the four respondents mentioned did decide then to keep Mr. Martin in the front as the owner and to conceal the true persons who were interested. I think that is a proper conclusion, and I think it is enforced by the continuous attempt in the process of the litigation to suppress the fact of the true ownership. I draw the inference that that was done because of the recent connection of these parties with the company. In my judgment that fact, that is to say, the agreement to suppress the true names or identity of the parties to this contract, is irrelevant to all the questions that arise under this statute of 1923. I think it has no bearing on the question of national interest, no bearing on the question of the danger of the permanent loss of the minerals, nor do I think it affects the question of the amount of fair compensation, or the question of whether the demand or the offer was unreasonable. But although it has no bearing on it, both that and the design behind it explain to my mind why the unreasonable price was asked. It might be said if it is irrelevant it was made an issue by the applicants, but I think that the applicants were entitled to know whom they had to deal with. As far as I am concerned, I put aside all the considerations affecting the conduct of these objectors, or these respondents, in deciding questions under the Act. As I have said, I think in Mr. Dunn's mind there were two ideas, one in respect of the company and its possible purchase of the land, and the other the development of this as an estate to be sold in plots.

Then the question is, was there a danger within the words of the statute of the minerals being left permanently unworked. I think there was, because the price demanded might be so high that the company could not buy the land which it was necessary to work in order to get

the minerals, or, if later bungalows were built, there was a danger that this land would be sterilised. If no order is made and the company cannot buy because of the excessive price asked, the plots may be sold for bungalows, with the consequent sterilisation of the land as land from which the minerals can be obtained, and I conclude, therefore, that there is danger of the minerals being left permanently unworked within the meaning of the words of the statute. It might be said : well, it is so remote that that ought not to be entertained, and I agree that probably these minerals will not be worked for many years ; but the real danger, or the danger, at any rate, is that the building of bungalows may sterilise the land, and that is not remote ; and I think that is a present danger, within the meaning of the Act, of the minerals being rendered permanently unworkable.

For the rest of it, there is the question which Mr. Miller raised that it is not within the Act, because these applicants are not desirous of working. If that is to be used strictly in the present case, there is nobody desirous, or not desirous now, of working, but they do intend to work. Probably, there again there were mixed motives in the objection. They may have been influenced partly by the question of nuisance, but they have said in terms in evidence in this court that they intend to work it in the proper course of development. Mr. Nalder said so in terms when he gave his evidence, putting it on the ground that the face of the present western quarry was getting too close. Mr. Steed said that the proper course of development was on the western face, and I think Mr. Lewis, a witness who was called for the applicants, said that that was the proper course of development.

For the rest of it, I agree that it is in the national interest, and I agree with the reasons which my Lord has given, and also I think Mr. Elliott showed what was a reasonable price when he said he would have taken very much less than £2,500. I think the value fixed, to which we have agreed, is a reasonable price as between a willing grantor and grantee.

SIR FRANCIS DUNNELL : I am in entire agreement with the judgments which have been delivered by the learned judge and SIR FRANCIS TAYLOR, and I do not think it is necessary to add anything by way of emphasis.

Solicitors : *Robbins, Olivey & Lake*, agents for *Nalder & Son*, Truro (for the applicants) ; *Bennison, Garrett & Co.*, and *Lawson, Elliott & Lawson* (for the respondents, other than Mr. and Mrs. Martin) ; *Shaen, Roscoe, Massey & Co.*, agents for *Foot, Bowden & Blight*, Callington (for the respondents, Mr. and Mrs. Martin)

[*Reported by* GERALD ABRAHAM, ESQ., *Barrister-at-Law.*]

Distinguished. GUNNER v. GUNNER
AND STIRLING. [1948] 2 All E.R. 771.

BROWN v. BROWN.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Langton, J.), July 6, 8, 30, 1936.]

Divorce—Variation of settlement—Immediate annuity to husband—Purchased after marriage—Gift—Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 192.

A wife immediately after her marriage signed a proposal form for an immediate annuity to her husband, and an insurance company thereupon entered into a deed, whereby the company agreed both with the husband and with the wife, in consideration of a certain sum paid by the wife, to pay to the husband a certain annuity. The marriage was dissolved and the wife sought to vary the annuity deed, as being a post-nuptial settlement under the Supreme Court of Judicature (Consolidation) Act, 1925, s. 192 :—

HELD : the annuity was not a settlement, but a gift, and the court could not vary its terms.

[EDITORIAL NOTE. The jurisdiction of the court to vary is limited to settlements and it cannot vary what is properly construed as an out and out gift. The present matter is probably a border-line case, since by a lump sum payable to an insurance company the wife provided an annuity for the husband. The court construed this transaction as a gift, despite the authorities that the word "settlement" in this connection must be given a wide interpretation.

AS TO THE WORD "SETTLEMENT" IN THIS CONNECTION, see HALSBURY, Hailsham Edn., Vol. 10, pp. 800, 801, para. 1275; and FOR CASES, see DIGEST, Vol. 27, pp. 520, 521, Nos. 5622-5631.]

Cases referred to :

- (1) *Bosworthick v. Bosworthick*, [1927] P. 64; Digest Supp.
- (2) *Dormer (orse. Ward) v. Ward*, [1901] P. 20; 27 Digest 521, 5629.
- (3) *Prinsep v. Prinsep*, [1929] P. 225; Digest Supp.
- (4) *Worsley v. Worsley & Wignall* (1869), L.R. 1 P. & D. 648; 27 Digest 246, 2174.
- (5) *Melwill v. Melwill & Woodward*, [1930] P. 159; Digest Supp.
- (6) *Hubbard (orse. Rogers) v. Hubbard*, [1901] P. 157; 27 Digest 520, 5623.
- (7) *Chalmers v. Chalmers* (1892), 68 L.T. 28; 27 Digest 520, 5622.
- (8) *Re Brunning, Gammon v. Dale*, [1909] 1 Ch. 276; 23 Digest 402, 4727.
- (9) *Standing v. Bowring* (1885), 31 Ch. D. 282; 17 Digest 214, 267.

MOTION by a wife petitioner to vary the report of the registrar, in which he found that an annuity purchased by the wife, shortly after the marriage, for the benefit of the husband was not a settlement within the Supreme Court of Judicature (Consolidation) Act, 1925, s. 192, and that the wife's petition asking that the annuity deed might be varied so as to extinguish the husband's rights thereunder consequently failed.

Noel Middleton, K.C., and J. F. Compton Miller for the petitioner.

J. Norman Daynes, K.C., and F. L. C. Hodson for the respondent.

LANGTON, J. : This motion has been admirably argued and it is no fault of the counsel engaged that I have experienced the greatest difficulty in reaching a determination of the issue.

The point in dispute can be succinctly stated. On Sept. 11, 1933, the petitioner, then Miss Ellen Siddall, married the respondent, Harold Brown. At the time of the marriage the petitioner was a spinster of independent means, aged 48, and the respondent was a working chauffeur, aged 27. The marriage was a secret one. On Sept. 15, 1933, four days after the marriage, the petitioner signed a proposal form for an immediate annuity to her husband, and the Prudential Assurance Company thereupon entered into a deed whereby they agreed both with the petitioner and with the respondent to pay to the respondent or his assigns an annuity of £104. The consideration paid by the petitioner for this annuity was £2,097 10s. 2d. The marriage between the parties having been dissolved, the point arises upon a question of variation of settlement whether the annuity so granted to the respondent is a settlement within the terms of sect. 192 of the Act of 1925. On behalf of the petitioner, it is contended that it is a post-nuptial settlement within the wide meaning which has always been given to this word in this section. The respondent, however, contends that it is a gift and contains no kind or degree of limitation, no lack of *plenum dominium*, and, in short, no characteristic whereby it could, by any fair construction of language, be described as a settlement.

No question arises as to whether the disposition (to use a neutral expression) was post-nuptial or not. The plain point at issue is simply whether the annuity is a settlement or a gift. A tantalising aspect of the matter is that the point is very nearly covered by authority, which is not only binding upon me, but which I would readily and gladly follow. Indeed, if it were right and fair to extract a single passage from a judgment and to apply the words there used in a merely literal sense, without taking into consideration the occasion of their use and the general context, it could be claimed, as Mr. Middleton claimed for the petitioner, that ROMER, L.J., when sitting in the Court of Appeal before he became a regular member thereof, has actually covered this case. In *Bosworthick v. Bosworthick* (1), at p. 72, ROMER, J., says :

We have had numerous authorities cited to us going as far back as 1861, and amongst them an authority which is binding on this court, and in my judgment those authorities establish that where a husband has made a provision for his wife, or a wife for her husband, in the nature of periodical payments, that amounts to a settlement within the meaning of the sections.

If I were at liberty to take those words literally, without reference to "those authorities" to which ROMER, J., refers, and ignoring the facts of the cases to which they applied, my troubles in this case would be at an end. ROMER, J., walks with swift stride and sure step over this kind of ground, where I feel that I walk haltingly and am prone to stumble. I could not wish for a safer guide, and I have only left the secure shelter of this authoritative pronouncement with the greatest

reluctance. I cannot, however, shut my eyes to the fact that the real point under discussion in *Bosworthick's* case (1) was whether an annuity secured by a bond could be treated under this sect. 192 as a settlement, and ROMER, J., is only purporting to decide what was before him and before the rest of the court, namely, whether a bond was a settlement. SCRUTTON, L.J., after deciding in the same way, because he felt that the Court of Appeal was bound by its own decision in *Dormer v. Ward* (2), had thrown out a challenge to chancery minds as to how they could bring the legal concept of bond within any of their accustomed uses of the word "settlement." ROMER, J., giving the next judgment, appears to me to be saying: "I am not interested in the challenge, because I have to deal not with what chancery lawyers may choose to think, but what an Act of Parliament—not necessarily or even probably the product of chancery minds—has actually provided." It is also clear that in the expression "those authorities," ROMER, J., is referring only to the authorities cited before him, none of which includes in express terms the point which is now before me. I am therefore sadly afraid that I am actually in the kind of difficulty foretold and foreseen with a characteristic touch of slightly malicious enjoyment by SCRUTTON, L.J., in the concluding sentence of his judgment. This is not to say that the decision in *Bosworthick's* case (1) is not of great importance in reference to the present case. I am at the moment only saying that it is not a clear and binding authority. It is, for example, clear authority for the proposition that an annuity as such is not to be excluded from the "settlements" included in the section, and it was plausibly argued on behalf of the petitioner in this case that if, on the authority of *Bosworthick's* case (1), an annuity secured by bond was a settlement, was not an annuity secured by deed *a fortiori* a settlement also? Moreover, the powerful authority of HILL, J., was pressed in aid to show that the fact that a covenant to pay proceeds from a third person does not prevent the disposition from being regarded as a settlement under the Act. In *Prinsep v. Prinsep* (3), at p. 232, HILL, J., says:

The particular form of it does not matter. It may be a settlement in the strictest sense of the term, it may be a covenant to pay by one spouse to the other, or by a third person to a spouse. What does matter is that it should provide for the financial benefit of one or other or both of the spouses as spouses and with reference to their married state.

Again, however, it must be borne in mind that HILL, J., was dealing with a payment by trustees. He was not considering what I may perhaps call an outside contract in the sense of being outside of and independent of any family arrangement on property with an insurance company.

The petitioner also relied upon *Dormer v. Ward* (2), which was a case decided upon the earlier Acts containing the same words, but it was not suggested that it was directly in point. It is a decision of the Court of

Appeal which went a long way towards extending the meaning of the word "settlement," and it is the authority upon which the Court of Appeal really founded their decision in *Bosworthick's* case (1), but it sheds no special light upon the particular problem in this case. Similarly, *Worsley v. Worlsey and Wignall* (4) was cited in favour of the petitioner. If the headnote in this case could be taken at its face value, again I think that my problem would be resolved. The headnote says :

All deeds, whereby property is settled upon a woman in her character as wife, and to be paid to her whilst she continues a wife, come within the scope of 22 & 23 Vict. c. 61, s. 5, and the court has power to deal with them.

The annuity deed in the present case is certainly a deed, so that if this were a correct statement of the law as decided by the judge ordinary, there would remain little more to be said. When, however, one studies the facts, the argument and the judgment in the case, it is clear that what was really occupying the court was whether a separation deed between the husband and wife partook of the character of being post-nuptial. As I read this case, there was no real dispute as to whether the deed in question was a settlement, and the judge ordinary determined the point at issue in the words at p. 651 :

The court would have a great difficulty in saying that any deed which is a settlement of property, made after marriage, and on the parties to the marriage, is not a post-nuptial settlement. It would not be justified in narrowing the reasonable scope of the words used in the section. The substance of the matter is, that the legislature by this section has armed the court with authority to make special arrangements in the case of a woman being found guilty of adultery, in reference to property settled upon her in her character as a wife. The substantial feature to bring the case within the clause of the statute is, that a sum of money is paid to a woman in her character as wife, or is settled upon her in that character and whilst she continues a wife.

Another important decision of the Court of Appeal which was pressed upon me on behalf of the petitioner was *Melville v. Melville and Woodward* (5). The particular instrument there under review differed *toto caelo* from an annuity obtained from an insurance company, but again the Court of Appeal insisted upon the wide interpretation which should be given to this section, and LORD HANWORTH, M.R., after collecting, on pp. 171 and 172, the various expressions enjoining this kind of interpretation, concludes his review on p. 172, with a commendatory citation of almost the whole of the short judgment of ROMER, J., to which I have already referred.

It is perhaps not surprising, in the circumstances, that at the conclusion of the argument for the petitioner I was left with the impression that I ought, if it were in any way possible, to hold that this deed was a post-nuptial settlement. I struggled hard to do so, but I regret to say that I have failed.

The argument for the respondent, put before me most attractively by Mr. Daynes, may be summarised in a sentence. This annuity is a gift and not a settlement. It is true, of course, as pointed out by ROMER, J., that in order to discover the meaning of the word "settlement" in this conjunction, one has not to look at DAVIDSON ON CONVEYANCING, or BLYTHWOOD AND JARMAN on the same topic, or any other of the enchanting volumes which occupy the working and no doubt also the leisure hours of the inhabitants of Lincoln's Inn, but only to the words and the intention of the statute itself. But if one finds that the transaction in question contains none of the attributes of a settlement and all or practically all the attributes of a gift, it would seem that one has reached the point where it is time to call a halt in the very desirable expression of the ambit of this section. In the case of *Hubbard v. Hubbard* (6) the Court of Appeal held decisively, and almost without troubling to give reasons for their decision, that an absolute assignment of a leasehold house and furniture to a wife was not a settlement, and none the less so because the property happened to have passed through the hands of trustees. It is interesting to observe that in so doing they approved the decision of SIR F. H. JEUNE, P., in another case of *Chalmers v. Chalmers* (7), whilst at the same time reversing his decision in the case under consideration. They also declined, as ROMER, L.J., declined thirty years after, to found any decision upon cases decided under other Acts of Parliament, such as the Bankruptcy Act; so that their decision is in no way at variance with the later decisions. It is an express decision upon the meaning of the word "settlement" in the circumstances in which it is here employed.

For my part, it appears to me that the payment of a sum of money to an insurance company to purchase an annuity for the respondent comes closer to the analogy of an assignment of property or goods than to any parallel that can be drawn from a bond. Accordingly I feel that I am much more nearly bound by *Hubbard's* case (6) than by that of *Bosworthick* (1), but even if I am not bound, since the decision is not directly in point, I cannot distinguish this annuity from a gift. It is to be observed that the covenant to pay is with the respondent as well as with the petitioner, and it appears to me that when once the petitioner had handed over the consideration money, she had parted with the *plenum dominium* of the property so transferred. It is no limitation of her property that the payments to be made to the respondent are to be made annually. The respondent can take, and in this case in fact has taken, steps to realise the immediate value of what has been transferred to him, and the position seems to me to be accurately reflected in the judgment of NEVILLE, J., in the case of *Re Brunning, Gammon v. Dale* (8). At p. 279, NEVILLE J., says:

Now it seems to me that the origin of the rule, that where money is bequeathed

to be invested in the purchase of an annuity it must be regarded as a vested legacy from the death of the testator of the sum that will purchase the annuity, was the idea that it was a matter of indifference whether the annuitant had his annuity purchased for him or received in cash the sum that would purchase it, because, if the annuity was purchased for him, he could sell it the next day. If that is so, I think the result is that when an annuity has been paid for a time the annuitant has the right, which passes to his legal personal representative, to say: "Give me the sum that will purchase the annuity from now onwards," and that he is entitled to be paid the sum that would purchase the annuity as at the date of the last payment to him.

I have not, of course, overlooked the fact pointed out by Mr. Middleton, that *Bunning's* case (8) concerns a disposition by will, but it seems to me to illustrate rather clearly the character of an annuity when considered in relation to the recipient. Upon the same line of reasoning Mr. Daynes cited *Standing v. Bowring* (9). That is a decision of a Court of Appeal of very high authority, pointing the distinction between a transfer of property with and without a resulting trust and deciding that there is no resulting trust in the case of a gift.

Mr. Middleton struggled hard in reply to argue that the transfer of this sum of £2,097 10s. 2d. could not be regarded as a gift, because the recipient, the respondent, can never have been in a position to part with the whole of it, since the insurance company must be taken to have secured some profit to themselves before agreeing to pay £104 per annum. I do not for a moment doubt the commercial soundness of this assumption, but it would seem to follow, if it be also legally sound, that a gift in pounds sterling to be converted into francs for the benefit of a French beneficiary, would no longer be a gift if a bank or money-changer were to exact their usual quota of profit on the exchange. This seems to be unarguable, and the fact that it is put forward at all is perhaps indicative of the nakedness of the land. I do not pretend to have found the elusive principle to which SCRUTTON, L.J., mockingly referred in *Bosworthick's* case (1). I can only base my decision upon the view which I have found, that this annuity is not a settlement because it is a gift.

It remains to notice a point made with force by Mr. Daynes, that in any event the court could not as a practical measure vary this arrangement, since the insurance company is in no sense before the court. The only covenant by the company is to pay to the respondent, and if the court relieves the company of that obligation, the company alone will benefit, since no order of the court can impose upon the company a new obligation to pay to someone else. This difficulty, though formidable at first sight, is not, perhaps, insuperable. I have not explored the possibilities of a garnishee order, nor the possibility of an order directing the respondent to pay over the amount of the annuity as and when received to the petitioner. Owing to the view which I have expressed on the main question, these matters do not arise. It should be under-

stood, however, that I have not based my view on this branch of Mr. Daynes' argument, though I am not sure that it does not throw some additional light on the real quality of the transaction between the spouses.

Solicitors: *Church, Adams, Tatham & Co.* (for the petitioner); *Capel Cure & Ball* (for the respondent).

[Reported by J. F. COMPTON MILLER, ESQ., Barrister-at-Law.]

RECENIA R. SHAERF, LTD. v. SMYTH (TRADING AS G. O. SMYTH & CO.)

[COURT OF APPEAL (Greer, Slessor and Scott, L.JJ.), July 27, 1936.]

Practice—Debt—Payment into court of part of claim in full satisfaction with admission of liability—Application to sign final judgment for whole amount—Possible defence disclosed in plaintiffs' affidavit—R.S.C., Ord. 14. r. 4.

The plaintiffs, in a claim for goods sold and delivered, said, in their affidavit, under R.S.C., Ord. 14, that the defendant had complained that the goods were not up to sample, but also said that they believed that he had no defence. The defendant paid into court part of the sum claimed, in satisfaction of the whole claim, with admission of liability. The plaintiffs took out a summons, under R.S.C., Ord. 14, asking leave to sign final judgment for the whole amount. On the day of the hearing of the summons the defendant filed a defence and counterclaim. The master dismissed the summons with costs and the judge in chambers upheld his order. On appeal:—

HELD: the master and judge should have allowed the plaintiffs to sign judgment under R.S.C., Ord. 14, r. 4, for such part of their claim as was admitted, but the plaintiffs were not entitled to the costs of the application to the master, as they had applied for leave to sign judgment for the whole amount and knew that there was a defence as to the bulk of it.

[EDITORIAL NOTE.] The particular matter arising under R.S.C., Ord. 14 here is when the application for summary judgment may be dismissed and when it is necessary to give the plaintiff judgment for part of the claim. Where part of the claim is clearly admitted, it seems that the only course open to the master is to follow R.S.C., Ord. 14, r. 4, and to allow the plaintiff to sign judgment for the admitted part.

AS TO SUMMARY JUDGMENT WHERE CLAIM PARTLY ADMITTED, see HALSBURY, Hailsham Edn., Vol. 19, p. 229, para. 531, and FOR CASES see DIGEST, Practice, pp. 295, 296, Nos. 274–277.]

APPEAL by the plaintiffs from an order made by GREAVES-LORD, J., made at chambers on July 7, 1936, dismissing, with costs to be taxed and paid forthwith, an appeal from an order of the learned master dismissing, with costs to be taxed and paid forthwith, an application of the plaintiffs for summary judgment.

On June 4 the plaintiffs issued a writ against the defendant for £92 6s. 11d. for goods sold and delivered. On June 22 the defendant entered an appearance and paid into court £20 1s. 10d., saying that that

sum was enough to satisfy the plaintiffs' claim and admitting liability therefor.

By his affidavit the plaintiffs' agent said that the defendant had bought the goods by sample and a few days later had telephoned to him complaining that they were not up to sample, and that he had later presented a debit note for the price of the goods. They further said that they verily believed that there was no defence to the action. On June 24 the plaintiffs took out a summons under R.S.C., Ord. 14, returnable on July 1, asking for leave to sign final judgment for the amount endorsed on the writ and costs. On July 1 the defendant filed his defence of "goods not up to sample" and counterclaimed for £37 8s. 4d. for breach of warranty. He paid into court a further sum of £34 17s. 9d. with a denial of liability, saying that this sum together with the sum of £20 1s. 10d. was enough to satisfy the plaintiffs' claim. After hearing the summons the master dismissed the summons with costs to be taxed and paid by the plaintiffs to the defendant forthwith. The learned judge dismissed the plaintiffs' appeal and gave leave to appeal to the Court of Appeal.

The plaintiffs appealed, asking that both orders might be reversed and that their application be remitted to the master; or that they be allowed to sign judgment against the defendant for £20 1s. 10d. and costs, with liberty to the defendant to defend the action as to the balance of the claim.

Valentine Holmes for the plaintiffs: Under R.S.C., Ord. 14, r. 9 (b) the learned master was only entitled to dismiss the application with costs if the case did not come within R.S.C., Ord. 14, at all, or if in the opinion of the judge the plaintiff knew that the defendant relied on a contention which would entitle him to unconditional leave to defend. This case came within R.S.C., Ord. 14. The master's order cannot have been correct, for there was an admission of liability as regards £20 1s. 10d. The master should have acted in accordance with Ord. 14 r. 4. The master was bound to make an order giving the plaintiffs judgment for £20 1s. 10d. with leave to the defendant, if he pleased, to defend as to the balance. The learned judge thought that the master ought to have given judgment but said that, if he had, he would have proceeded to stay execution, and so his Lordship dismissed the appeal. If the plaintiffs had been given judgment with stay of execution, they would not have had to pay the costs of the summons forthwith. Moreover, execution could not have been stayed on the ground that there was a counterclaim, for the counterclaim could only operate if the defendant had been liable to the plaintiffs for the whole of the £92 6s. 11d. that was claimed, the counterclaim being for only £37 8s. 4d. Although the plaintiffs are admittedly owed £20 1s. 10d., they have been dismissed from both courts with an order to pay the defendant's costs forthwith.

Thomas Southall for the defendant: The learned judge agreed that the master had dealt properly with this case under R.S.C., Ord. 14, r. 9 (b), and said that to bring the action under R.S.C., Ord. 14 was an abuse of the procedure under that order. At the time the plaintiffs' affidavit was sworn they knew perfectly well that there was a *bona fide* dispute, in which circumstances R.S.C., Ord. 14 is not the proper procedure for a plaintiff to adopt. The £20 ls. 10d. was paid into court in full satisfaction; this does not amount to a direct payment-in with admission of liability, for liability is only admitted as to part of the claim. Had the proceedings not been brought under R.S.C., Ord. 14, the money paid in could only have been taken out in satisfaction of the whole claim. On the plaintiffs' own affidavit there was clearly a *bona fide* defence and the master would have been bound to give unconditional leave to defend. The plaintiffs are clearly trying to "take two bites" at their judgment.

SCOTT, L.J.: When the plaintiffs issued their summons they knew that to the extent of £20 ls. 10d. the action was undefended.

Southall: Also that there was a counterclaim. The defendant is not bound to set out his defence in detail by the time he comes before the master. The plaintiffs ought not to have taken out their summons, particularly as the payment into court was made under R.S.C., Ord. 22, r. 1, in satisfaction of the whole claim.

GREER, L.J.: In this case we think that the learned judge did not take the right view of the position of the parties at the time they came before him. The view which was applicable, in my judgment, and which ought to be applied, is in R.S.C., ord. 14, r. 4, which is in these terms:

If it appears that the defence set up by the defendant applies only to a part of the plaintiff's claim, or that any part of his claim is admitted, the plaintiff shall have judgment forthwith for such part of his claim as the defence does not apply to or as is admitted, subject to such terms, if any, as to suspending execution, or the payment of the amount levied or any part thereof into court by the sheriff, the taxation of costs or otherwise, as the judge may think fit; and the defendant may be allowed to defend as to the residue of the plaintiff's claim.

It seems to me that, whatever may have been the position when the writ was endorsed, when the matter came before the master the plaintiffs by their writ were entitled to say that there was then no defence except as to that part of the claim which exceeded £20 ls. 10d., and the learned master ought to have given judgment for that amount. As he did not give judgment for that amount and there was an appeal to the judge, the judge ought to have given judgment for that amount.

With regard to the costs of the application before the master: speaking for myself, I think that the plaintiffs ought to have no costs of that application. What they were applying for was not merely judgment for

£20 ls. 10d. on demand; they were applying for the whole amount of their claim and were not entitled to it, especially as they had anticipated, before they took out their application for judgment, that there would be a defence to practically the whole action. As regards the appeal from the master to the judge, however, we think that Mr. Holmes's clients ought to have the costs of that appeal.

SLESSER, L.J. : I agree.

SCOTT, L.J. : I agree.

Appeal allowed, with costs of the appeal, but not of the application to the master.

Solicitors : *Cardew Smith & Ross* (for the appellants); *C. Butcher & Simon Burns* (for the respondent).

[*Reported by* DEREK H. KITCHIN, Esq., *Barrister-at-Law.*]

TOLNAY AND ANOTHER v. CRITERION FILM PRODUCTIONS, LTD.

[KING'S BENCH DIVISION (Goddard, J.), July 28, 30, 1936.]

Damages—Breach of contract—Loss of publicity—Screen credit—Author of screen play.

The plaintiffs were engaged by the defendants to write a screen play based upon a novel and by a collateral agreement the defendants were to give the plaintiffs screen credit and their names were to be thrown upon the screen with a statement that they were joint authors of the work. The defendants wrongfully refused to accept the plaintiffs' work and the plaintiffs sued them for breach of contract :—

HELD : an author, as well as an actor, is entitled to recover damages for loss of publicity. Substantial damages should be awarded, and there must be a separate assessment in respect of each plaintiff.

[EDITORIAL NOTE.] The refusal to award damages for loss of publicity in *Turpin v. Victoria Palace, Ltd.*, [1918] 2 K. B. 539; 42 Digest 913, 89, was reversed in *Marbe v. George Edwardes (Daly's Theatre), Ltd.*, [1928] 1 K.B. 269; 42 Digest 911, 71, and the principle that such damages can be awarded was finally approved in the House of Lords in *Herbert Clayton and Jack Waller, Ltd. v. Oliver*, [1930] A.C. 209; Digest Supp. In all these cases the parties claiming such damages were actors and in the present case the principle is extended to authors.

FOR THE LAW ON THE POINT, see HALSBURY, Hailsham Edn., Vol. 10, p. 132, para. 169; and FOR CASES, see DIGEST, Vol. 17, p. 104, No. 181 and Supp.]

ACTION for damages for breach of contract contained in a memorandum of agreement made between the plaintiffs and the defendants, dated Aug. 15, 1935, and in a letter written by the defendants to Akos Tolnay, one of the above named plaintiffs, dated Aug. 15, 1935.

The agreement made between the plaintiffs and the defendants was to produce for them a screen play to be a full adaptation of a novel called the "Amateur Gentleman." While the plaintiffs were engaged on the work

and when they had nearly finished it, the defendants suddenly stopped the work. The defendants made an offer in respect of this breach of contract, which the plaintiffs refused. The defendants refused to accept the play, and instead of using the work done by the plaintiffs, turned to an authoress and got her to produce a play very largely on the basis of the plaintiffs' work. By the letter of Aug. 15, 1935, the defendants undertook to give the plaintiffs screen credit, i.e., to have the plaintiffs' names thrown upon the screen as joint authors of the work. In the circumstances they could not do this, and the plaintiffs claimed to be entitled to substantial damages in respect of the breach of this collateral or supplemental agreement. It was contended for the defendants that the damages (if any) recoverable under this head could only be nominal. The case is only reported upon this point.

J. Busse for the plaintiffs.

D. N. Pritt, K.C., and *C. H. Duveen* for the defendants.

GODDARD, J. : [His Lordship dealt with the principal breach of contract and found for the plaintiffs.] I now come to another part of the case which gives me a very great deal of difficulty, and that is with regard to the claim for the breach of the collateral contract claimed in the letter of Aug. 15, under which screen credit was promised to these gentlemen. It seems to me that really the same principles must apply in the case of the author of a play as apply to an actor or actress in a play, and as I understand the authorities that have been cited, it has been held, and has been upheld by the Court of Appeal and approved in the House of Lords, that if a manager undertakes to allow an artiste to appear upon the stage and breaks his contract, the artiste is entitled to damages for the loss, not for injury to reputation already acquired, but for loss of advertisement or publicity, which, I suppose, would enhance the artiste's reputation in the future. I do not think it would be possible to draw a distinction between an author and an actor. They are both of them artistes. One is a creative artiste and the other is an artiste who interprets. The value of publicity is no doubt the same to both of them, although I think it may be a matter which might affect my mind as a juryman and in assessing damages in this case I have to assess them as best I can as a jury would. I should think myself that the loss to an actor or actress of publicity, the actor or actress being persons who are actually seen in the flesh by the public and whose worth the public can only estimate by seeing them perform with their own eyes, is more serious in their case than it is in the case of an author. But I doubt not that the loss of publicity is serious to an author. All persons who have to make a living by attracting the public to their works, be they artistes in the sense of painters or be they literary men who write books or who perform in other branches of the arts, such

as pianists and musicians, must live by getting known to the public. An unknown author we all know has a great struggle in the same way as an unknown musician or actor has a great struggle. Mr. Williams in this case is already known in this country, and Mr. Tolnay, I think, is not known as an author in this country. One way in which they can expect remuneration and expect employment is by getting their name before the public. Therefore, I think that as they have been deprived here of screen credit, it must be that they have suffered damage, and it must mean that they have suffered damage which is not nominal, and I am bound to give a separate sum to each of them.

Judgment for each plaintiff for £100 in respect of loss of publicity.

Solicitors: *Samuel Tonkin, Booth & Co.* (for the plaintiffs); *F. M. Guedella & Co.* (for the defendants).

[*Reported by* LESLIE CARNEGIE, ESQ., *Barrister-at-Law.*]

PROSSER v. RICHINGS AND ANOTHER.

[KING'S BENCH DIVISION (Lord Hewart, L.C.J., Talbot and Goddard, JJ.),
July 21, 1936.]

Street Traffic—Heavy motor vehicle—Weight transmitted to road surface—Ascertainment of weight—Motor Vehicles (Construction and Use) Regulations, 1931 (S.R. & O., 1931, No. 4), reg. 59.

An information was preferred against the owners of a four-wheeled heavy motor vehicle for permitting it to be used in such a manner that the sum of the weights transmitted to the road surface by the two rear wheels in line transversely exceeded 8 tons, contrary to the Motor Vehicles (Construction and Use) Regulations, 1931, reg. 59. There was a camber of the road at the place where the weights were measured, and in consequence of the use of the weighing instruments the rear wheels were at the time when the weights were recorded lifted slightly from the ground. The justices dismissed the information on the ground that there should be no unevenness of surface or gradient between the places where the front wheels and the rear wheels stood, and that no evidence had been given of this fact. They also held there was no evidence that the defendants "permitted" the offence:—

HELD: (i) the Motor Vehicles (Construction and Use) Regulations, 1931, reg. 59, in its universal language, makes no exception with regard to the place at which or the gradient on which the weight is to be ascertained. (ii) the defendants in accepting the load to be carried, permitted the user of the vehicle contrary to the regulation.

[**EDITORIAL NOTE.** The construction of regulations is here again held to be a consideration of the actual language used in the regulation, and not what some persons might think was the practical result of the regulation.

FOR THE MOTOR VEHICLES (CONSTRUCTION AND USE) REGULATIONS, see STONE'S JUSTICES' MANUAL, 1936, p. 2113, and FOR REG. 59, see p. 2129 and notes thereto. FOR CASES, see DIGEST, Vol. 42, pp. 869, 870, Nos. 189-197.]

APPEAL by way of case stated from a decision of justices sitting at Tewkesbury, dismissing an information preferred by Frank Ernest

Prosser, an inspector of weights and measures, against John Charles Richings and George Edward Battershell, trading as Richings & Battershell, for having on Dec. 16, 1935, permitted to be used on a road a four-wheeled heavy motor vehicle which was then laden in such a manner that the sum of the weights transmitted to the road surface by the two rear wheels in line transversely exceeded 8 tons, contrary to the Motor Vehicles (Construction and Use) Regulations, 1931, reg. 59. Two weighing instruments had been used simultaneously, one under each of the rear wheels. The weight recorded under the off rear wheel was 4 tons 7 cwt. and under the near rear wheel 4 tons 9 cwt. 2 qrs., a total of 8 tons 16 cwt. 2 qrs. In consequence of the use of the weighing instruments the rear wheels were, at the time when the weights were recorded, lifted slightly from the ground. The driver of the vehicle was at the time in the employment of Richings & Battershell. The justices were of opinion that: (a) the onus was on the informant to show that the method of weighing was satisfactory; (b) the informant had failed to discharge such onus for the following reasons: (i) that the rear wheels of the vehicle at the time of weighing being (owing to the camber of the road) on uneven ground, would show different weights; (ii) that there was no evidence whether the front wheels were standing on ground which was at exactly the same level as the rear wheels; (iii) that to obtain a correct test of the weight transmitted by the two rear wheels the vehicle should have been standing in such a position that the weight would not be likely to be thrown from the front part of the vehicle to the rear, and no evidence was given that such was the case; (c) there was no evidence to prove that Richings & Battershell or either of them "permitted" the alleged offence.

The information was accordingly dismissed. The informant appealed.

R. C. Hutton for the appellant.

The respondents did not appear.

LORD HEWART, L.C.J.: This case, stated by justices, arises out of an information preferred by the present appellant, an inspector of weights and measures, against the present respondents, for that on a certain day, in the county of Gloucester, they permitted to be used on a road a four-wheeled heavy motor-vehicle then laden in such a manner that the sum of the weights transmitted to the road surface by the two rear wheels in line transversely exceeded 8 tons, the excess being 16 cwt. 2 qrs. above the permitted maximum of 8 tons. The justices dismissed the information and the question for us is whether, in so doing, they came to a correct decision in point of law. The law is to be found in the Motor Vehicles (Construction and Use) Regulations, 1931, reg. 59. The only question of law which arises on the first part of the case is whether the justices correctly interpreted or misdirected themselves on the meaning of this

regulation. When one looks at the regulation, it is found to be an absolute prohibition. The words are :

The weight transmitted to the road surface by any one wheel of a heavy motor car where no other wheel is in the same line transversely shall not exceed 4 tons and the weight so transmitted by any two wheels in line transversely shall not exceed, in the case of a vehicle with four wheels, 8 tons . . . and the sum of the weights transmitted to the road surface by all the wheels of the heavy motor car shall not exceed, in the case of a vehicle with four wheels, 12 tons [and in other cases 19 tons and 22 tons respectively].

There is no provision there with reference to the particular circumstances of any given highway, the amount of the camber or the gradient of a hill. The prohibition appears to be absolute.

Here the facts found are that, when the weight transmitted to the road surface by the two rear wheels of the respondents' vehicle was ascertained, it was 16 cwt. 2 qrs. in excess of the weight allowed by the regulation. But, that fact having been established, the justices entertained evidence on other matters. They have found that, in consequence of the use of the weighing instruments, the rear wheels were, at the time when the weights were recorded, lifted slightly from the ground. They have found, further, that there was a camber of the road at the place where the measurement took place, and they have come to the conclusion that, having regard to the position of the rear wheels at the time of weighing—that is to say, their position on uneven ground by reason of the camber of the road—a different weight might be shown from the weight which would be shown on a perfectly flat surface. It is contended by Mr. Hutton that that consideration is really irrelevant and that the regulation, in its universal language, makes no exception with regard to the place at which, or the gradient on which, the weight is ascertained. I think that that is the true view of the regulation. Otherwise, indeed, it might be rendered altogether futile, because it would be a little difficult to find a place which was perfectly level, and it would be idle to say that only on such a place would excessive weight in the rear wheels of the motor-vehicle do harm.

There remains, however, the further question whether there was evidence that the respondents, who were the employers, permitted the vehicle so to be used. On the whole, I think that there was such evidence. It is suggested that it is not the kind of case where the vehicle was sent out to be loaded and that those who were actually driving the vehicle superintended the loading. But the case finds that the vehicle was properly loaded and that it could not have been safely loaded in any other manner. It seems to follow, therefore, that if the load was accepted to be taken by that vehicle, it cannot be said that any default or error on the part of the driver or other person superintending the loading of the vehicle is responsible for that which took place. I think that in those

circumstances the only conclusion is that the employers, having put their man in the position to do those acts and having accepted that load to be carried, cannot be heard to say that they did not permit the vehicle so to be used.

On the whole, therefore, I think that the true conclusion is, the regulation being rightly construed, that there were no materials on which the justices could find that the offence had not been committed, and that the case ought to go back to the justices with a direction that the offence which was charged was proved.

TALBOT, J. : I am of the same opinion. The statement in the case of the conclusions of the justices numbered (ii) and (iii) seems to be quite clear. They appear to say that it was essential that the level of the road on which the weights were taken, looking at the road from front to back and not across, should be an exact level—that is to say, that there should be no unevenness of surface or gradient as between the places where the front wheels and the rear wheels stood. The same thing, really, is stated in each of those paragraphs in different ways ; and, indeed, more clearly in the latter, because it is said there that, to obtain a correct test of the weight, the vehicle should be standing in such a position that the weight would not be likely to be thrown from the front part of the vehicle to the rear. That applies to the state of affairs to be found in the vast majority of the roads all over the country. It is an exception to find, in most parts of the country, any substantial length of road in which the level is exactly uniform. I think it is clearly necessary, in order to support the conclusion to which the justices came, that the regulation should be construed in the way stated by the justices—that it is essential to a correct test that the surface should be level. I have nothing further to add to what my Lord has said about the construction of the regulation. I think it follows that the conclusion of the justices cannot be supported because they have not construed correctly the regulation as a point of law.

I have nothing to add with regard to the question of permitting.

GODDARD, J. : I agree.

Solicitors : *Field, Roscoe & Co.*, agents for *R. L. Moon*, Gloucester (for the appellant).

[*Reported by T. A. DILLON, Esq., Barrister-at-Law.*]

Re CHARTERED SURVEYORS' BENEVOLENT FUND (INCORPORATED).

[CHANCERY DIVISION (Bennett, J.), July 27, 1936.]

Companies—Benevolent association—Amalgamation with another association—Extension of objects.

A benevolent association desired to extend its objects to include the members and their dependants of any society with which it might amalgamate. The association proposed an early amalgamation and wished to be enabled to give relief to the members of the society with which it proposed to amalgamate :—

HELD : the court ought not to confirm the alteration of the objects of the association unless the association undertook to amalgamate only upon the terms that there should be an amalgamation of funds as well as of members. The undertaking was given and the alteration confirmed.

[EDITORIAL NOTE.] The objects of a company may now be altered by a special resolution subject to the sanction of the court. The difficulty here was that the funds of the society were in effect trust funds subscribed for the benefit of a particular class and it would be unfair to extend the class without bringing in further funds.

AS TO ALTERATIONS OF OBJECTS, see HALSBURY, Hailsham Edn., Vol. 5, pp. 456-462, paras. 741-746; and compare Vol. 17, pp. 451-453, paras. 943-948; and FOR CASES, see DIGEST, Vol. 9, pp. 649-656, Nos. 4293-4376.]

PETITION for confirmation by the court of a proposed change of the objects of the Chartered Surveyors' Benevolent Fund (Incorporated). The Association wished to extend its power to grant gratuitous relief to include necessitous persons who were members, ex-members and their dependants of any society, association or institution with which the Chartered Surveyors' Institution or the Association had amalgamated or combined or might hereafter amalgamate or combine, as well as persons who were or had been members of the Chartered Surveyors' Institution, their widows, children and immediate relatives dependent upon them. An amalgamation was proposed between the Association and the Scottish Estate Factors' Society, and it was desired to extend the objects of the Association in order to enable it to give relief to members of that society.

G. P. Slade for the Association.

BENNETT, J., granted the petition and confirmed the extension of the objects of the Association upon receiving an undertaking that the Association would only amalgamate or combine with the Scottish Estate Factors' Society upon the terms that the funds of the two associations were amalgamated. His Lordship said he would not confirm a scheme under which the members of the Scottish Estate Factors' Society were put upon the books of the Association, while the fund of the Scottish Estate Factors' Society was kept for the purposes of that society alone.

Solicitors : *Beale & Co.* (for the Chartered Surveyors' Benevolent Fund (Incorporated)).

[Reported by T. A. DILLON, Esq., Barrister-at-Law.]

SAKARIYAWO OSHODI, since deceased (now represented by DISU AKINYEMI OSHODI) *v.* BRIMAH BALOGUN AND THE SCOTTISH NIGERIAN MORTGAGE AND TRUST COMPANY, LTD.

[PRIVY COUNCIL (Lord Blanesburgh, Lord Maugham and Lord Roche),
June 16, 18, July 16, 1936.]

Privy Council—Nigeria—Native lands in Lagos—Alienation of land, part of a compound, by headman without the consent of the chief and family—Acquiescence of family by laches.

Certain lands in Lagos were granted by the British Crown as family lands to Chief Oshodi Tappa, head of the Oshodi family, in 1862. Subsequently he divided the lands into 21 compounds and appointed a head, at that date a slave, who upon emancipation later became an arota, to each compound and in 1869 the Government issued a series of Crown grants absolute in form to the various heads of the compounds so appointed. In 1913 an arota purported of himself, and without reference to the Oshodi family to convey or transfer an absolute or fee simple interest in part of his compound, and in 1927 the purchaser in 1913 claimed to be entitled to the fee simple as the result of a subsequent acquiescence by certain members of the Oshodi family. There was in fact no chief of the Oshodi family for about twenty years of the relevant period :—

HELD : as there was no consent by the chief and his family as a whole to the transfer, an absolute fee simple title in the property did not pass, and there was no sufficient subsequent acquiescence by the family. Observations as to the application of the doctrine of laches to places where native law is in a fluid state.

[EDITORIAL NOTE. This case will be of interest wherever there are native lands and particularly concerns the application by analogy of the Statute of Limitations in such cases, and the presumption of acquiescence by native chiefs and families. In the present case there was a vacancy of about twenty years in the chieftainship of the family and their Lordships considered that a circumstance which told strongly against a title by acquiescence or lapse of time.

FOR THE LAW ON THE POINT, see HALSBURY, Hailsham Edn., Vol. 11, pp. 239-241, paras. 456, 457; and FOR CASES, see DIGEST, Vol. 17, pp. 458-461, Nos. 253-296.]

Cases referred to :

- (1) *Sakariyawo Oshodi v. Moriamo Dakolo*, [1930] A.C. 667; Digest Supp.
- (2) *Idewu Inasa v. Sakariyawo Oshodi*, [1934] A.C. 99; Digest Supp.
- (3) *Akpan Awo v. Cookey Gam* (1913), 2 Nig. Rep. 97.

APPEAL by Disu Akinyemi Oshodi, representative of Sakariyawo, Chief Oshodi, deceased, from a majority judgment of the Full Court of the Supreme Court of Nigeria (SIR DONALD KINGDON, C.J., and WEBBER and BERKELEY, JJ.), dated Apr. 7, 1931, allowing the plaintiffs' (respondents) appeal from a judgment of TEW, J., dated Oct. 8, 1929. The main facts of the case were not in dispute and appear in the judgment of their Lordships delivered by LORD MAUGHAM.

Horace Douglas for the appellant.

Robert F. Irving and *Sydney E. Pocock* for the respondents.

LORD MAUGHAM : In this case the plaintiffs (the respondents) by an action commenced on Aug. 16, 1927, sought against the defendant Sakariyawo, Chief Oshodi, as head and representative of the family of Chief Oshodi Tappa, deceased, a declaration that the plaintiffs are owners in fee simple of the property lying and being at No. 16, Ajia Ijesha Court, Oshodi Street, Lagos, Nigeria. There was no counterclaim and the defendant was content to admit that he claimed the property on behalf of himself and as head and representative of the said family and to deny the title of the plaintiffs on whom the onus of establishing the alleged title must rest. The original defendant is now dead and the family is represented by Disu Akinyemi Oshodi the present appellant.

The main facts are not in dispute and may be shortly stated. The territory of Lagos was ceded to the British Crown in 1861 ; but the cession did not affect the character of the private native rights over the land which remained as they were before the cession. Oshodi Tappa, the then head of the Oshodi family, had been exiled from Lagos. In 1862 he and other exiles were allowed to return, and it appears that certain vacant lands at Epetedo, including that now in dispute, were granted to him as family lands. He divided the lands at Epetedo into 21 compounds, appointed a head (who was at that date a slave and who became when slavery was abolished an arota or domestic) to each compound, reserving a compound for his personal use. In 1869 the government issued a series of Crown grants absolute in form to the various heads of the compounds so appointed by Oshodi Tappa. These compounds have been the subject of litigation in courts of Lagos only too frequently, and two of the cases have come before this Board. In the first (*Sakariyawo Oshodi v. Moriamo Dakolo* (1)) the nature and legal effects of the crown grants are considered ; in the second (*Idewu Inasa v. Sakariyawo Oshodi* (2)) the compounds and the status and position of their occupants are more fully described. No useful purpose would be served by repeating what was said by VISCOUNT DUNEDIN or by LORD BLANESBURGH in delivering the judgments of their Lordships in these cases, and in stating in general terms the position and title according to native law and custom of their occupants. It is sufficient for the present purpose to say that a headman with such a grant has only a grant in trust, that his descendants have a right on his death to occupy his particular allotment in the compound, and that in the event of his family failing and being extinct (and in general not till then) the chief of the family has a right of reversion on behalf of the family. In the present case the trouble arises from the circumstance that a headman (an arota) in 1913, purported of himself and without reference to the Oshodi family, to convey or transfer an absolute or fee simple interest in No. 16, Ajia Ijesha Court, part of that compound. His assignees or transferees claim to be entitled to the

fee simple as the result of a subsequent acquiescence by the family which the transferees attempted to prove at the trial.

The *Dakolo* case (1) was not concerned with any question as to the alienation of family lands. There is, however, no dispute on this matter. In olden days it is probable that family lands were never alienated; but since the arrival of Europeans in Lagos many years ago a custom has grown up of permitting the alienation of family lands with the general consent of the family; and a large number of the premises at Lagos on which substantial buildings have been erected for the purposes of trade or permanent occupation have been so acquired. These alienations in the great majority of cases have been to persons not members of the family to whom the lands had been allotted, and their Lordships see no reason for doubting that the title so acquired by these purchasers was an absolute one and that no reversion in favour of the chief was retained. In recent times the title deeds have been made out in English form and duly registered according to law, and their Lordships do not intend to express any doubt as to the validity of these titles. The respondents, indeed, do not question this view of the native law; but, as already indicated, they contend that the facts subsequent to the grants to the first respondent and his predecessors in title justify the conclusion that the family tacitly consented to the grant, and that native law and custom cannot now be invoked to defeat the title of the respondents. The trial judge was unable to find that the Oshodi family knowingly acquiesced in the alienation of the land. In the Full Court SIR DONALD KINGDON, C.J., agreed with this view. BERKELEY, J., and WEBBER, J., however, came to a contrary conclusion; and in the result the appellate court granted the declaration which the plaintiffs claimed. On this appeal their Lordships' main duty is to determine which of these views on the question of fact is to prevail.

Before detailing and commenting on the evidence relevant to the question it is necessary to point out the special position of the Oshodi family as regards No. 16, Ajia Ijesha Court. As above stated the allotment of these premises and the subsequent Crown grant in 1869 relating to, and including, them was in favour of an arota (domestic), at that time, at least in some sense, a slave. As headman he owed certain services to the chief, but no rent was payable and he could be evicted by the chief for certain acts considered according to native law and custom to be improper in a tenant. The allotment belonged in effect to the family of the headman whilst any of them were alive. He himself had no more than a right of occupancy and on his death it passed to his descendants. Upon failure of his offspring the land reverted to the Oshodi family. It is beyond doubt that the headman by himself had no right of alienation, but it seems now to be well settled in Lagos that the land could be alienated even by a domestic with the consent of the

Oshodi family. It is plain that without such consent, whatever might be the position while descendants of the headman were alive, a matter on which their Lordships express no opinion, the reverter (so to describe it) to the Oshodi family could not be got rid of without their consent.

Two circumstances must then be borne in mind in considering whether the Oshodi family can be held to have acquiesced in the permanent alienation to a stranger of the premises in question. The first is that the chief and the elders of the family might well think whilst a number of children or other issue of the headman were alive that it was not worth while to object to an alienation, since if it were prevented or declared void, the reverter to the family would still be very far distant. The second is that evidence of an acquiescence in an alienation of lands in the other compounds must be regarded as evidence of very slight, if any, weight, since the circumstances as regards the respective families entitled to occupy the other premises might be very different. Nor is it easy to see why the family as a whole was not at full liberty to acquiesce in some cases and to abstain from an acquiescence in others.

In the present case the evidence of acquiescence by the family in the alienation to a stranger is, to say the least, singularly scanty. The relevant deeds are as follows: The Crown grant is dated May 5, 1869, and is duly registered. The next deed is an indenture of conveyance on sale dated Mar. 20, 1912, made between Momodu Awo and Abudu Karimu Damola, who was a son of one Fayiba a domestic of Oshodi Tappa. There follows a conveyance dated Oct. 5, 1912, and made between Abudu Karimu Damola and Lawami Folami described as a trader. This purports to be a sale in consideration of the sum of £25. Then there is a conveyance dated Mar. 21, 1914, between Lawami Folami and the respondent Brimah Balogun also described as a trader. This was a sale in consideration of £66. Finally there is an indenture of mortgage dated Oct. 15, 1924, and made between the respondent Balogun and the second respondent in consideration of a loan of £320 at 15 per cent. All these conveyances purported to deal with fee simple estates. The Oshodi family is not mentioned in any way, and it would seem that the purchase money on each sale was taken by the person who purported to sell the property. It was the mortgage to the second respondent that led to the present proceedings. The mortgagees instructed an auctioneer to sell No. 16, Ajia Ajisha Court. The chief, Sakariyawo Oshodi, attended the sale and claimed the property. A brief correspondence in Aug., 1927, was followed on Aug. 16, by the present action.

The parol evidence at the trial so far as it related to No. 16 may now be briefly summarised. Lawami Folami deposed that he was a nephew of Ajia Ajishi, a slave of Oshodi Tappa, and that he came to the compound with his father, who was not connected with the Oshodi family. He occupied two properties in the compound. He bought No. 16, the

premises in question, for £25, and as above stated obtained the conveyance of Oct. 5, 1912. He sold the premises to the respondent Balogun for £66 on Mar. 21, 1914. He made, he said, no secret of the sale; but he obtained no consent and he gave no evidence that any members of the family other than arotas (domestics) knew of the alienation. A valuable house was built on the site by the respondent Balogun and anyone who came to the compound could see it. For some 20 years (roughly from 1905 to 1925) there was no installed chief of the Oshodi family, though during this period there were recognised heads of the family. The respondent Balogun was called. The "storey house" which he built on the site cost him £1,053. When he bought the land there was only a shed on it. When he was building his house, one, Rabiū Oshodi, living in the same compound, told him he ought to know that the land belonged to Oshodi, Rabiū's father. The witness, however, went on building. Whatever one may infer from this evidence it obviously does not tend to prove acquiescence by the family.

The evidence given on behalf of the defendants corroborated the fact that for about 20 years after the death of Oshodi Tappa there had been no installed "Chief Oshodi." The original defendant Sakariyawo Oshodi, who was called as a witness, was the son of Oshodi Tappa. He had been the chief for about five years when he gave his evidence in May, 1929. He said that as chief his principal business was to manage affairs at Epetedo and to control the 21 compounds which were occupied by "slaves" of his father and their descendants. So far from consenting to any sale by any of these persons he had on divers occasions warned domestics not to deal in land in the compounds, and no actual sale or mortgage of any of such land had come to his knowledge. (This man, it must be remembered, was a party to both the cases before this Board above referred to.) A member of the family, one Alfred Ade Oshodi, was also called by the defendant. He was a moneylender and contractor, and he stated that he had lent money on mortgages of Epetedo land without consulting anyone. He said he took mortgages of Epetedo land "in ignorance," but this was probably untrue. He also asserted that when there was no chief there was no rule against selling or mortgaging Oshodi land. To their Lordships this seems to be an impossible view of native law, for there must always be some interval, sometimes a long one, between the death of a chief and the installation of his successor, and if the statement were true it would mean that when a chief dies the arotas (or in older days the slaves) in mere occupation of land could sell such land to strangers for money and leave numbers of persons, arotas of the family, unprovided with homes. The witness seems to have been more concerned to protect the security for his loans on mortgage than to support the claims of the Oshodi family or the chief who had called him as a witness. Other members of the family were called to

deny that they had acquiesced in sales of land in the compounds. In the view of their Lordships it is a fact of some importance in the present case that there was no established chief during the period which included the dates of the two conveyances and the mortgage, and also the time of the erection of the substantial house by the respondent Balogun, and that as soon as there was an effective head of the family he at once objected to alienations and mortgages of lands in the compounds by the arotas in occupation without the consent of the family. The inference would seem to be that the native rights of the family were being very imperfectly protected during this species of interregnum, not that they were being given up.

On a careful consideration of the evidence as a whole, and there is really nothing of weight beyond what is above stated, their Lordships are forced to the conclusion that it is quite insufficient to justify the finding (contrary to the view of the learned trial judge) that the Oshodi family acquiesced after the event in the sale in question. There is, moreover, great weight in the observation of SIR DONALD KINGDON, C.J., that he found it impossible to believe that the members of the Oshodi family, knowing that they possessed what he described as a dormant fee simple over a large area, deliberately agreed to the family's ex-slaves selling it and pocketing the proceeds. An acquiescence in such an alienation *ex post facto* by a few additional members of the family would clearly not justify a finding that the family in general had acquiesced in a sale to a stranger of a fee simple; their inaction in the matter would not, for reasons already given, necessarily indicate anything more than that little or no benefit was likely to be derived by raising the matter and possibly involving the family in an expensive litigation. On the whole their Lordships have come to the conclusion that the finding of the trial judge was right and that the plaintiffs in the action failed to establish that by the tacit consent of the Oshodi family as a whole, the fee simple or the absolute title to No. 16, Ajia Ijesha Court had passed to the plaintiffs.

In coming to this conclusion on the facts proved in the present case their Lordships do not desire to throw any doubt on the decision of the Full Court in the case of *Akpan Awo v. Cookey Gam* (3) and other decisions of that character. In such a place as Lagos, where the native law is in some respects in a fluid state as the result of the pressure of the necessities of trade and of European laws and customs it may well be just and equitable, in the absence of a statute of limitation, to hold it inequitable to deprive persons of property of which they have held undisputed possession for many years, and to decide that the knowledge and acquiescence of the native family who originally owned the land may fairly be presumed, and that even though the rights of the family may appear to be remote. All that their Lordships are now deciding is that

in the circumstances of the present case, and not forgetting the exceptional circumstances in relation to the chief, the plaintiffs have failed to establish a knowledge and a long continued acquiescence by responsible members of the Oshodi family sufficient to justify the decision that the plaintiffs have acquired an absolute title or in English terms a fee simple in the property. The question whether the defendants may not have some title to the property or some rights to remain in occupation of it, although they have failed in their wider claim, has not been raised in the action and their Lordships express no opinion upon it. To prevent misconception it seems desirable to state that the present decision is not based on any doubt as to the possibility of a title equivalent to a fee simple being obtained as the result of a sale of family lands with the general consent of the family. VISCOUNT DUNEDIN, in delivering the judgment of the Board in the *Dakolo* case (1), did not say anything inconsistent with this. The phrase (p. 668) "the paramount chief is owner of the lands, but he is not owner in the sense in which owner is understood in this country. He has no fee simple, but only a usufructuary title" must be read in the light of the original claim of the chief which was that he was entitled beneficially to the whole of the compensation payable by the government in respect of family lands. The last sentence above quoted means only that the chief as contrasted with the family as a whole has no fee simple. The dispute was in fact between the chief as plaintiff and the occupants as a body as defendants. No question as to the extent of the family title arose.

Their Lordships think it right to express the opinion that the wide differences of opinion of learned judges as to the titles to lands in Lagos disclosed in the present case and in a number of cases to which reference has been made, and the frequent actions in the courts to which these doubts give rise, make it very desirable to deal with these questions by legislation.

In their Lordships view and on the grounds above stated the present appeal must succeed and the action must be dismissed with costs here and below. They will humbly advise His Majesty accordingly.

Appeal allowed with costs.

Solicitors : *Oldfields* (for the appellant) ; *E. F. Hunt & Sherrin* (for the respondents).

[Reported by T. A. DILLON, Esq., Barrister-at-Law.]

R. W. CRABTREE & SONS, LTD. v. R. HOE & COMPANY, LTD,
 [COURT OF APPEAL (Lord Wright, M.R., Romer and Greene, L.JJ.).
 July 15, 16, 20, 21, 30, 1936.]

Patent—Action for infringement—Validity of patent—Ambiguity—Construction of claim—“Substantially as hereinbefore described”—Claim of a principle—Widening words.

The plaintiffs brought an action for infringement of their patent for “Improvements in or relating to apparatus for printing late news in newspaper printing machines.” The defendants denied infringement and alleged that the patent was invalid.

The words “substantially as hereinbefore described” appeared in the usual way at the end of the claims. The following words also appeared in the specification: “It will be understood that the invention is not limited to the actual construction or to the combination of the features of the construction hereinbefore described as the operations described may be carried out in constructions considerably different without departing from the invention.” BENNETT, J., held that the patent was void for ambiguity. The plaintiffs appealed:—

HELD: (i) any ambiguity must be resolved in the favour of the plaintiffs and the restriction of the invention to a particular type of mechanism.

(ii) the words “substantially as hereinbefore described” merely refer back to the body of the specification and their scope and meaning vary in each particular case.

(iii) in this case they referred to the whole specification and to each element in the combination but they had not the effect of making the claim one for a principle.

(iv) the words set out above beginning “it will be understood . . .” though now common in specifications, are obscure in their meaning, are not a description of anything, cannot be imported into the claim by the words “substantially as hereinbefore described,” and are not a proper way of claiming a principle. The use of such words is to be avoided.

[EDITORIAL NOTE.] The significance of the words “substantially as hereinbefore described” are here considered at length. The particular significance of these words here considered is how far they extend claims so that they are no longer specific and become open to objection as ambiguous. The usual guarded claim to a principle by the use of widening words that has become common in specifications is also criticised and its use adversely commented on.

AS TO CLAIMS, see HALSBURY, 1st Edn., Patents, Vol. 22, pp. 161–163, paras. 338–341; and FOR CASES, see DIGEST, Vol. 36, pp. 633–636, Nos. 1034–1056.]

Cases referred to:

- (1) *Ackroyd & Best, Ltd. v. Thomas & Williams* (1904), 21 R.P.C. 737; 36 Digest 631, 1000.
- (2) *Ingersoll Sergeant Drill Co. v. Consolidated Pneumatic Tool Co., Ltd.* (1907), 25 R.P.C. 61; 36 Digest 634, 1040.
- (3) *Young & Neilson v. Rosenthal & Co.* (1884), 1 R.P.C. 29; 36 Digest 585, 460.
- (4) *Westinghouse v. Lancashire & Yorkshire Ry. Co.* (1884), 1 R.P.C. 98; 36 Digest 634, 1036
- (5) *Holmes v. Associated Newspapers, Ltd.* (1910), 27 R.P.C. 136; 36 Digest 636, 1052.

- (6) *Parkinson v. Simon* (1895), 12 R.P.C. 403; 30 Digest 184, 521.
- (7) *Rose Street Foundry & Engineering Co., Ltd. v. India Rubber Gutta Percha & Telegraph Works Co., Ltd.* (1929), 46 R.P.C. 294; Digest Supp.
- (8) *Gormully & Jeffery Manufacturing Co. v. North British Rubber Co.* (1898), 15 R.P.C. 245; 36 Digest 757, 2411.
- (9) *Natural Colour Kinematograph Co., Ltd. v. Bioschemes, Ltd.* (1915), 32 R.P.C. 256; 36 Digest 631, 996.
- (10) *Tucker v. Wandsworth Electrical Manufacturing Co., Ltd.* (1925), 42 R.P.C. 531; 36 Digest 587, 479.
- (11) *Hale v. Coombes* (1925), 42 R.P.C. 328; 36 Digest 635, 1046.
- (12) *Marconi's Wireless Telegraph Co., Ltd. v. Philips Lamps, Ltd.* (1933), 50 R.P.C. 287; Digest Supp.
- (13) *R.C.A. Photophone, Ltd. v. Gaumont-British Picture Corp., Ltd.* (1936), 53 R.P.C. 167; Digest Supp.
- (14) *Hattersley (George) & Sons, Ltd. v. Hodgson (George), Ltd.* (1906), 23 R.P.C. 192; 36 Digest 640, 1100.
- (15) *Longbottom v. Shaw* (1891), 8 R.P.C. 333; 36 Digest 547, 134.
- (16) *Jupe v. Pratt* (1837), 1 Web. Pat. Cas. 144; 36 Digest 762, 2442.
- (17) *Chamberlain & Hookham, Ltd. v. Bradford Corp.* (1903), 20 R.P.C. 673; 36 Digest 763, 2448.
- (18) *British United Shoe Machinery Co., Ltd. v. Simon Collier, Ltd.* (1908), 26 R.P.C. 21; 36 Digest 763, 2452.
- (19) *Automatic Weighing Machine Co. v. Knight* (1889), 6 R.P.C. 297; 36 Digest 763, 2446.
- (20) *Ridd Milking Machine Co., Ltd. v. Simplex Milking Machine Co., Ltd.*, [1916] 2 A.C. 550; 33 R.P.C. 309; 36 Digest 631, 1002.
- (21) *British Thomson-Houston Co., Ltd. v. Metropolitan-Vickers Electrical Co., Ltd.* (1928), 45 R.P.C. 1; Digest Supp.
- (22) *No-Fume, Ltd. v. Frank Pitchford & Co., Ltd.* (1935), 52 R.P.C. 231; Digest Supp.

APPEAL from an order of BENNETT, J., dated July 30, 1935. The plaintiffs were the registered owners of letters patent No. 270,363, granted to Smith for "improvements in or relating to apparatus for printing late news in newspaper printing machines," and dated Dec. 3, 1925. Claim 1 of the complete specification read as follows :

Late news printing mechanism of the kind referred to, in which means are provided whereby contact between the respective box cylinder and the impression cylinder can only be effected when the box cylinder is running at the correct speed and in register in the peripheral direction, relatively to the impression cylinder, substantially as hereinbefore described.

Claim 2 read as follows :

Late news printing mechanism as specified in claim 1, in which means are provided to prevent the disconnection of the mechanism driving the printing cylinders while the impression cylinder and the respective box cylinders are in contact one with the other, substantially as hereinbefore described.

Before the claims, the specification contained the following widening words :

It will be understood that the invention is not limited to the actual construction or to the combination of the features of the construction hereinbefore described

as the operations described may be carried out in constructions considerably different without departing from the invention.

The plaintiffs claimed that a machine sold by the defendants infringed their patent. The defendants denied infringement and pleaded that the plaintiffs' patent was invalid by reason of prior publication, prior common general knowledge, lack of subject matter, and ambiguity of the claims. BENNETT, J., held that the patent was void for ambiguity and did not consider any of the other matters raised in the pleadings. The plaintiffs appealed to the Court of Appeal.

K. E. Shelley and *G. T. Aldous* for the appellants.

R. Moritz, K.C., and *James Mould* for the respondents.

Shelley : This case turns on the meaning of the phrase "substantially as described." The courts have said that the claims of a patent specification must be self-contained and that it must not be necessary to refer back to the specification for further limitations : *Ingersoll Sergeant Drill Co. v. Consolidated Pneumatic Tool Co., Ltd.* (2). The widening words are just as much a part of the specification as the words "substantially as described" and must also be considered when construing the latter. It has never been suggested that these words limit the patentee to the exact modification described. The true result of the cases is that the words are meaningless. It is necessary to construe the claims with reference to the specification, whether the words "substantially as described" are there or not. They merely make express what is already there impliedly by law. The patentee has invented a new principle of construction and shown a method of effecting it. It is new and he is entitled to protection. [He referred to *Young & Neilson v. Rosenthal & Co.* (3) and *Westinghouse v. Lancashire & Yorkshire Railway Co.* (4).] The words mean that you must have present each element of the combination, substantially as described : *Holmes v. Associated Newspapers, Ltd.* (5). You cannot by these words withdraw your claim from the region where it would be anticipated. You must give to the specification a construction which does not give an identical meaning to each claim : *Parkinson v. Simon* (6). Therefore claim 1 must be read as not being limited to the precise mechanism shown ; otherwise the remaining claims would be identical : *Rose Street Foundry & Engineering Co., Ltd. v. India Rubber, Gutta Percha & Telegraph Works Co., Ltd.* (7) ; *Gormully & Jeffery Manufacturing Co. v. North British Rubber Co.* (8) ; *Tucker v. Wandsworth Electrical Manufacturing Co., Ltd.* (10) ; *Hale v. Coombes* (11) ; and *Marconi's Wireless Telegraph Co., Ltd. v. Philips Lamps, Ltd.* (12). The sole ground upon which this patent was held to be invalid was the inherent incompatibility between two passages in the specification : *Ingersoll Sergeant Drill Co. v. Consolidated Pneumatic Tool Co., Ltd.* (2), and *Natural Colour Kinematograph Co., Ltd. v. Bioschemes, Ltd.* (9). By the words of the grant itself a patent is to be interpreted in the light

most beneficial to the patentee : *Hattersley (G.) & Sons, Ltd. v. Hodgson (G.), Ltd.* (14). [He also referred to *R.C.A. Photophone, Ltd. v. Gaumont British Picture Corporation, Ltd.* (13).]

Aldous : Such a wide construction of the claim as is suggested would be void, as it would be claiming all mechanisms for producing a certain result : that is devoid of subject matter.

Moritz, K.C. : There is no evidence in this case of any long-felt want, as there was in *Longbottom v. Shaw* (15). The court must construe the specification and claims without any regard to the alleged infringement or to any alleged anticipation ; but the court is allowed to know the common general knowledge of the art. If the patent is valid, then and only then should the infringement be considered. But if it is not possible to put a construction on the document, it is void for ambiguity. There are two possible constructions for claim 1 : a narrow claim for the precise means of interlocking disclosed ; or a broad claim to any type of interlock. The plaintiffs have contended for both constructions. You cannot have a valid claim for a problem without the solution. If you discover a new principle and one means of carrying it into effect, you can claim all means of carrying it into effect : *Jupe v. Pratt* (16), approved of in *Chamberlain & Hookham, Ltd. v. Bradford Corporation* (17). But you cannot claim all methods for doing automatically what has already been done manually : *British United Shoe Machinery Co., Ltd. v. Simon Collier, Ltd.* (18). A claim to automaticity *per se* is bad ; that is what claim 1 in this patent is. You cannot have a patent for a principle : *Automatic Weighing Machine Co. v. Knight* (19). But where you claim a principle and a means for carrying it into effect, there must be a clear and unmistakeable description of the principle : *Ackroyd & Best, Ltd. v. Thomas & Williams* (1) ; and you must also claim it precisely : *Ridd Milking Machine Co., Ltd. v. Simplex Milking Machine Co., Ltd.* (20). If what is here claimed is the solution of the problem by means of interlocking, that problem had been stated and solved by Hallam and Scott prior to the date of the patent. The plaintiffs' claim would prevent the construction of the apparatus shown in Hallam and Scott. If the words "substantially as described" mean anything, they must include the whole description in the specification : *Tucker v. Wandsworth Electrical Manufacturing Co., Ltd.* (10). Interlocking mechanism is old, and the appellants' interlocking mechanism is exactly described in one of the prior publications relied on.

Mould : There is a duty on every patentee to decide the scope of the monopoly he is claiming, and to make an honest attempt to define it clearly : *Natural Colour Kinematograph Co., Ltd. v. Bioschemes, Ltd.* (9). This is a claim to automaticity and is bad : *British United Shoe Machinery Co., Ltd. v. Simon Collier, Ltd.* (18). It is also contrary to the Statute of Monopolies, s. 6. If a principle is sought to be claimed, it should be

stated in the clearest possible terms : *Ackroyd & Best, Ltd. v. Thomas & Williams* (1). Functional identity is not sufficient to establish infringement ; there must be substantial mechanical identity. There is therefore no infringement in this case.

Shelley, in reply : The words “substantially as described” must not be given a special meaning ; all they mean is that one must read the specification : *Ackroyd & Best, Ltd. v. Thomas & Williams* (1) ; *Ridd Milking Machine Co., Ltd. v. Simplex Milking Machine Co., Ltd.* (20) ; and *Hale v. Coombes* (11). The evidence proves that this was the first non-stop late news printing machine. Linotype & Machinery, Ltd., and Mascord’s inventions achieved no useful result. Each of the prior specifications is only a paper document. [He referred to *British Thompson-Houston Co., Ltd. v. Metropolitan-Vickers Electrical Co., Ltd.* (21).] The patentee discovered a general solution of a problem and has shown one way of carrying it into effect ; he can therefore claim all ways. In some cases the scope of the monopoly must of necessity be defined by function : *No-Fume, Ltd. v. Frank Pitchford & Co., Ltd.* (22).

LORD WRIGHT, M.R. : The judgment which GREENE, L.J., is about to read is the judgment of the court.

GREENE, L.J. : This is an appeal from a judgment of BENNETT, J., whereby he dismissed the action with costs. The plaintiffs claimed the usual relief based on an alleged infringement of their letters patent No. 270,363. The defence denied infringement and disputed the validity of the patent on the grounds of prior publication, lack of subject matter and ambiguity. BENNETT, J., only dealt with the last mentioned ground, holding that the patentee was guilty of avoidable ambiguity in failing to state with clearness whether his claim was a broad or a narrow claim, and that the specification was phrased in such a way as to enable the patentee to contend for either view. Having held the patent void on this ground, he was under no necessity to deal with the other matters of defence which have been debated before this court.

The claims are seven in number. Each of them is a claim to a combination in which some of the elements were already known and could not at the date of the specification form the subject matter of a valid grant. It is the addition to those elements of a further element which forms the basis of the claim to novelty in the combination. We will for convenience refer to the first mentioned elements as the old elements and to the further element as the new element. The old elements are described in claim 1 (and by reference in the other claims also) as “Late news printing mechanism of the kind referred to.” It is agreed that these words refer back to a passage of the specification, which reads as follows :

Late news printing mechanism . . . of the kind comprising an impression

cylinder and box cylinders adapted to be alternatively brought into operative position with respect to the impression cylinder.

This description at once raises a question, the answer to which, if adverse to the appellants, will be sufficient to dispose of the action, although, in view of the learned judge's decision that the patent is invalid, it will not dispose of the appeal.

The question arises in this way. There was at the date of the patent in suit a known type of late news printing mechanism in which two fudge box cylinders were used, their arrangement being such that, when one was in operative position in relation to the impression cylinder, the other was not. The result of this arrangement was that, when the machine was printing late news, one box cylinder was in operation while the other was necessarily idle. If in this state of things further late news arrived, a fudge box carrying the necessary type was inserted in the idle box cylinder, which was then brought into operative position by a movement which at the same time withdrew the first cylinder from operation, the relative movement of the two cylinders resembling that of the two ends of a see-saw. An example of this type of see-saw arrangement is to be found in the apparatus described in the specification patent no. 184,987, of Linotype & Machinery, Ltd., and the box cylinders which it comprises fall exactly under the description "adapted to be alternatively brought into operative position with respect to the impression cylinder."

Another known type of arrangement was one where two or more box cylinders were used, arranged in such a way that both or all could be in operative position at the same time or one or some could be in operative position while the other or others would be idle. An example of this type of arrangement is to be found in the apparatus described in the specification of Mascord's United States patent no. 1,301,072.

In the present case the mechanism which is alleged to be an infringement of the plaintiffs' patent does not belong to the see-saw type but to the second type; that is to say, the box cylinders are not arranged in such a way that, while one is in operative position, the other is necessarily idle, although in practice it is possible to work them in such a way that, while one is in operative position, the other is not. If, on the true construction of the passage above cited, the mechanism referred to is confined to what for convenience we may call the see-saw type, there has admittedly been no infringement. It is said by Mr. Shelley on behalf of the appellants that the words "adapted to be alternatively brought into operative position" mean no more than this, that the box cylinders are to be capable of being brought alternatively into operative position and do not mean that the construction is to be such that they cannot both be in operative position at the same time.

In our opinion, this interpretation does not give due effect to the

language used. We are ready to assume that the words "adapted to be" in some contexts may mean "capable of being," but in this specification they ought not, in our judgment, to be so read. When the detailed description of what the patentee calls "the features" which the invention comprises is examined, it will be found that the type of mechanism shown is the see-saw type, and that type alone, and there is nothing in the specification from beginning to end to suggest that the patentee is thinking of any other type. There is no suggestion anywhere as to what alterations in the mechanism would be required in the case of a different type. Moreover, in proceeding to describe the means for preventing premature contact between a box cylinder and the impression cylinder, the patentee uses the phrase "contact between the respective box cylinder and the impression cylinder." The words "respective box cylinder" here mean, in our judgment, that box cylinder which in accordance with the alternating movement of the two box cylinders is to be brought into contact with the impression cylinder. Having regard to these considerations and also to the words in the claim "substantially as hereinbefore described," which apply to each element in the combination, any ambiguity in the word "adapted" ought, in our opinion, to be resolved in favour of the view that the mechanism referred to is confined to the see-saw type.

If this view is correct, it follows that the plaintiffs fail in their action; but, as BENNETT, J., held that the patent was void, it is necessary to deal with the other matters which were discussed before us and for that purpose to make a critical examination of the specification.

Non-stop late news mechanism constructed in accordance with the old elements described in the specification had this obvious defect, that, if by carelessness or mistake on the part of the operative a box cylinder was brought into printing relationship with the impression cylinder at a time when the box cylinder was not running at the correct speed and in register, the paper was liable to be torn or spoilt. The same danger existed in the converse case, where a box cylinder had to be withdrawn from printing relationship. The new element in the combination is designed to remedy this defect. It is described in claim 1 in the following words:

Means . . . whereby contact between the respective box cylinder and the impression cylinder can only be effected when the box cylinder is running at the correct speed and in register in the peripheral direction relatively to the impression cylinder.

In claim 2, which is the complement of claim 1, dealing as it does with the reverse process, the new element is described as "means to prevent disconnection." The difference in phraseology imports no difference in meaning. In each case the means are inhibitory of the movement

which it is desired to avoid. For present purposes it is only necessary to consider claim 1.

Apart from a passage of the specification, to which we will refer later, we should have found no difficulty in construing claim 1. The words "substantially as hereinbefore described," which are found at the end of the claim, have been considered in a number of cases ; but we are unable to find in those cases any principle of construction applicable to them, except that they refer back to the body of the specification—a principle for which no authority appears to be needed. Their scope and effect will differ according to the context in which they are used and we find no guidance in cases where they have been considered in relation to specifications quite different from the present.

In the present specification, if the passage which we have mentioned, be for the moment disregarded, they refer, in our judgment, to the specific description of the mechanism, including that of the inhibitory means, set forth in the body of the specification and to nothing else. That specific description, which contains the only description of inhibitory means contained in the body of the specification, is introduced by the words :

The invention further comprises the features which are hereinafter described with reference to the drawings accompanying the provisional specification.

The description, it is true, contains a statement of the effect of the inhibitory means employed ; but this is not a description of the means ; it is merely a statement of the result obtained by their employment.

Mr. Shelley argues for a much wider construction of claim 1. He says that it is a claim for the principle of non-stop late news mechanism comprising a linkage or interlock which constitutes the new element in the combination ; and that, having described one method of applying that principle, his claim for the principle is valid and covers any mechanism embodying it. If this view is right and on the assumption that (contrary to our own opinion) the appellants' construction of the words "adapted to be brought into operative position" is the correct one, the respondents' apparatus is admittedly an infringement since it uses interlocking mechanism. If, on the other hand, the claim is confined to the narrow limits which we have indicated, there is admittedly no infringement since the method by which the interlocking effect is obtained in the respondents' apparatus is substantially different from that specifically described in the body of the specification. Mr. Shelley elaborated his statement of the principle which he claimed by paraphrasing claim 1 so as to make clear the interpretation for which he contended. We need only refer to that part of the paraphrase which relates to the inhibitory means. The part of the claim dealing with this element in the combination he paraphrased as follows : "There must be a linkage

between the mechanism which brings the box cylinder shaft into and out of printing relationship and the mechanism which connects and disconnects the drive to the box cylinder shaft so that the box cylinder shaft must have been fully connected, that is to say, be running at the right speed and in register before the box cylinder shaft can be moved into operative position." It would not be fair to tie Mr. Shelley down to the exact wording of this paraphrase, but in substance it expresses the construction for which he argued.

When this paraphrase is examined it will be seen that it is worded in such a way as to escape a dilemma, each horn of which would destroy the appellants' case. That dilemma is as follows: If the claim so far as it relates to interlocking is to be limited to the interlocking mechanism described in the body of the specification, there is no infringement; if, on the other hand, the claim is so broad as to include all means of preventing premature contact, it amounts to no more than the statement of a problem, since the inventor would merely be saying: The way to prevent premature contact is to provide means for preventing it. A patentee is not entitled in this way to obtain a monopoly of all possible means of remedying a known defect, nor did Mr. Shelley argue that he could. His construction of the claim, so far as it relates to the inhibitory means, was what may be called an intermediate one, the effect of which was to include and include only what he describes in his paraphrase as "linkage" (which is the same thing as interlock) between the two pieces of mechanism concerned.

In order to make good this argument he has two difficulties of construction to surmount. The first lies in the phrase "substantially as hereinbefore described," which is fatal to the argument, if it confines the claim to the type of linkage specifically described. The second lies in the fact that it is only by giving a suitable meaning to these words that any limitation can be found to the "means" referred to in the claim. That word in the claim is not in terms limited to any particular means, much less to that type of means which can be described as linkage or interlock between the two pieces of mechanism. It would, for instance, cover a device by which access to the manipulating handle (by which the operative moves the box cylinder shaft so as to bring the cylinder into printing position) was prevented until the box cylinder was in register and moving at the appropriate speed. In order to extract this intermediate meaning from the language of the claim, Mr. Shelley relied on certain passages in the body of the specification describing the operation of the mechanism. We are unable to find in these passages anything to justify a construction of the claim as a claim for a principle, such as is put forward by Mr. Shelley. They appear to us to be nothing more than descriptions of the way in which the mechanism described works and the results obtained thereby and it is not, in our judgment,

permissible to spell out from the claim, when read in the light of these passages, a claim to a principle covering all forms of linkage or interlock. To do so would violate the rule that a claim to a principle must be stated in clear terms. (See *Ackroyd & Best, Ltd. v. Thomas & Williams* (1), per COZENS-HARDY, L.J., at p. 750.)

Mr. Shelley also relies strongly on a passage of the specification, in these terms :

It will be understood that the invention is not limited to the actual construction or to the combination of the features of the construction hereinbefore described as the operations described may be carried out in constructions considerably different without departing from the invention.

We were informed by counsel that this passage is now frequently found in patent specifications. In our judgment, the sooner the practice of inserting it is abandoned the better. Its meaning is obscure and in many cases it may be open to the criticism, upon which BENNETT, J., founded his judgment, that it represents an attempt by the patentee to get the best of both worlds by arguing for a wide or a narrow construction of his claim as occasion may require. Mr. Shelley says that this passage forms part of the description referred to in the words "substantially as hereinbefore described" and that, when read into the claim, it has the effect of extending the claim beyond the specifically described mechanism so as to include any type of mechanism in which the operation of linkage or interlock is carried out. The answer to this argument, in our opinion, is that the passage does not say so. It contains no description either of the combination which is the subject matter of the claim or of any element in the combination; and it is to the combination and each element in the combination, including the inhibitory "means," that the words "substantially as hereinbefore described," which are relied on as importing the passage into the claim, relate. The passage does not describe any means by which the linkage or interlocking is to be effected. At the most it says that the linkage or interlocking, which is one of the "operations" to which it refers, "may be carried out in constructions considerably different" from those described. This is far from saying that the patentee is intending to claim the principle of linkage or interlock as the pith and marrow of his invention. If he had meant that, he would presumably have said that his invention covered all constructions in which that principle was embodied, instead of saying that the operation may be carried out in constructions "considerably different" from those described.

Our conclusions upon this argument may be summarised as follows : (i) The words "substantially as hereinbefore described" refer to the whole combination claimed and to each element in the combination including what we have called the inhibitory means; (ii) the only description of those means to be found in the specification is the

description of the mechanism set out in the specification ; (iii) that description is not a description of any principle of linkage or interlock ; (iv) the passage that "the invention is not limited to the actual construction, etc.," is not a "description" of anything and cannot be imported into the claim by the words "substantially as hereinbefore described" ; (v) even if it can be called a "description," it is not a description of the principle so-called of linkage or interlock.

Mr. Shelley's argument, therefore, in our opinion, breaks down on the question of construction ; but, there is, we think, another fatal objection to the case which he endeavoured to make. Even if the inhibitory means referred to in the claim are, on the one hand, to be understood as extending beyond the means specifically described and, on the other hand, are to be limited to means embodying the principle of linkage or interlock, as distinct from any means whereby the desired result may be achieved, the claim would, in our opinion, be invalid for want of subject matter. As we have already pointed out, the means in question constitute the only element of novelty in the combination and their purpose is to remedy an obvious defect in a known piece of mechanism. The idea of using a linkage or interlock in order to prevent two pieces of mechanism from operating simultaneously until their movements or positions are in the desired relationship one to the other was at the date of the patent in suit a familiar one. A device for effecting this purpose is shown on p. 92 of SHAW'S DRIVING AND MACHINE TOOLS, and, indeed, the idea must have been an obvious one to anyone familiar with mechanical apparatus.

In our judgment, no valid claim could be made for the principle of linkage or interlock as applied to known types of mechanism as distinct from some definite embodiment of it. If it could, the effect would be to prevent anybody but the patentee from using that principle, in whatever form embodied, to remedy a known and obvious defect. It carries the matter no further to say that the claim is for a combination in which the principle of linkage or interlock forms only one element.

In the result, we do not find it necessary to apply the principle upon which BENNETT, J., rested his decision. Upon their true construction the claims are, in our opinion, limited to the mechanism specifically described in the specification and, if this be the true view, we do not think that it would be right to penalise the patentee for the reason that he has introduced into the body of his specification a passage of vague and uncertain import such as that which we have been discussing. Had we felt any real doubt as to the true construction of the claims, we should have been prepared to hold the patent void upon the principle applied by BENNETT, J. That principle is a salutary one, and it is well that those who draft patent specifications should take note of it ; but apart from cases where the court is satisfied that there is a deliberate intention

on the part of the patentee to mislead the public, we think that its application ought to be confined to cases where the ambiguity is such that no reasonably certain construction can be placed upon the language used. Upon the whole we do not think that the present is such a case.

There remain two matters which we ought to mention. It is said that the narrow construction of claims 1 and 2 is inadmissible, because they would then cover all the other claims in which individual details in the mechanism are described and those other claims would accordingly be redundant. We do not think that this argument ought to be allowed to outweigh the considerations which have led us to our conclusion. The words "substantially as hereinbefore described" in claims 1 and 2 are, in our judgment, too intractable and, if their use leads to a result which makes the remaining claims redundant, the responsibility for that result lies in the draftsmanship of the specification.

The other matter relates to patent no. 128,489 of Hallam and Scott, which is relied on as an anticipation by the respondents. In our judgment, this patent is not an anticipation. The patent in suit is, we think, clearly limited to a type of mechanism where the box cylinder itself is moved in space into its operative position and where it is not permanently in register and running at a speed identical with that of the impression cylinder. The mechanism covered by patent no. 128,489 is of an entirely different type.

In the result the appeal will be dismissed with costs, but upon the ground that, as the claims are to be narrowly construed, there has been no infringement and not upon the ground that the patent is void.

Solicitors: *Rooks, Wales, Godwin & Galsworthy* (for the appellants); *Smith, Rundell, Dods & Bockett* (for the respondents).

[*Reported by E. FULLER BRISCOE, Esq., Barrister-at-Law.*]

RE HARRODS (BUENOS AIRES), LTD.

[CHANCERY DIVISION (Bennett, J.), July 6, 1936.]

Companies—Practice—Reduction of capital—Subsequent increase, subdivision and consolidation of capital—Form of minute for registration—Companies Act, 1929 (c. 23), s. 58.

A company, which desired to vary the constitution of its capital, petitioned the court for an order sanctioning a scheme of arrangement which involved the reduction and subsequent increase, subdivision and consolidation of capital. The capital was to be reduced by converting certain issued ordinary shares of 15s. each into ordinary shares of 12s. each. The capital was then to be increased by the issue of redeemable preference shares of £1 each and shares of 4s. each. It was part of the scheme that the unissued ordinary shares of 15s. each should be subdivided and consolidated into ordinary shares of 12s. each. It was proposed that the minute of reduction to be registered under the Companies Act, 1929, s. 58, should be approved in a form which, after dealing with the reduction, stated the amount and constitution of the share capital at the date of the registration of the minute, but did not give details of the increase, subdivision and consolidation of the capital:—

HELD: the scheme should be sanctioned and the suggested form of order should be approved.

[EDITORIAL NOTE.] Companies for one reason or another are often anxious to effect an alteration in the arrangement or constitution of their shareholding and to increase or decrease the amount of the preference shares relative to ordinary shares. This case is useful in showing a scheme for such purpose that has had the approval of the court and also the exact form of minute required.

FOR ORDER CONFIRMING REDUCTION OF CAPITAL, see HALSBURY, Hailsham Edn., Vol. 5, pp. 182-186, paras. 325-330; and FOR CASES, see DIGEST, Vol. 9, pp. 166-168, Nos. 1004-1030. FOR COMPANIES ACT, 1929, s. 58, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 2, p. 813.]

PETITION for an order of the court sanctioning a scheme of arrangement and confirming a reduction of capital of Harrods (Buenos Aires), Ltd. Under the scheme the capital was to be reduced from £5,458,000 to £4,855,712 4s. by converting the 4,015,252 issued ordinary shares of 15s. each into the same number of shares of 12s. each. On the reduction taking effect, the capital was to be increased again to £5,458,000 by the creation of 587,500 redeemable preference shares of £1 each and 73,939 shares of 4s. each. The 112,748 unissued ordinary shares of 15s. each were to be subdivided and consolidated into 140,935 ordinary shares of 12s. each. It was proposed that the minute of reduction to be registered under the Companies Act, 1929, s. 58, should be approved in a form which, after dealing with the reduction, stated the amount and constitution of the share capital at the date of the registration of the minute, but did not give details of the increase, subdivision and consolidation of the capital.

H. Wynn Parry, K.C., and L. B. Tillard supported the petition.

BENNETT, J., sanctioned the scheme and approved the minute in the following form :

The capital of Harrods (Buenos Aires), Ltd., was by virtue of a special resolution of the company and with the sanction of an order of the High Court of Justice dated July 6, 1936, reduced from the former capital of £5,458,000, divided into 2,350,000 preference shares of £1 each, 4,128,000 ordinary shares of 15s. each, and 240,000 deferred shares of 1s. each to £4,855,712 4s. divided into 2,350,000 preference shares of £1 each, 4,015,252 ordinary shares of 12s. each, 112,748 ordinary shares of 15s. each and 240,000 deferred shares of 1s. each. At the date of the registration of this minute all the said preference shares, ordinary shares of 12s. each and deferred shares had been issued and were deemed to be fully paid up, and none of the said ordinary shares of 15s. each had been issued. By virtue of a scheme of arrangement sanctioned by the said order and of a special resolution of the company the capital of the company on the registration of this minute is £5,458,000 divided into 587,500 redeemable preference shares of £1 each, 2,350,000 preference shares of £1 each, 4,156,187 ordinary shares of 12s. each, 240,000 deferred shares of 1s. each, and 73,939 shares of 4s. each, of which all the preference shares, 4,015,252 ordinary shares numbered to inclusive, and all the deferred shares are issued and deemed fully paid, and all the redeemable preference shares, 140,935 ordinary shares and all the shares of 4s. each are unissued.

Solicitors : *Slaughter & May.*

[Reported by T. A. DILLON, ESQ., Barrister-at-Law.]

UNITED DAIRIES (WHOLESALE) LTD. v. LEMON AND THE MILK MARKETING BOARD.

[KING'S BENCH DIVISION (Branson, J.), July 20, 21, 22, 23, 29, 1936.]

Agriculture—Marketing scheme—Determination of prices—Milk Act, 1934 (c. 51), s. 4.

The plaintiffs agreed to take all the milk produced by the first defendant's cows for a year from Oct. 1, 1934, provided that the second defendants gave them a rebate in respect of every gallon used for manufacturing purposes, such rebate to be the difference between the regional price of milk and the manufacturing price. The agreement in a schedule provided for the calculation of the manufacturing price. This method of determining the manufacturing price proved impracticable and by agreement in Oct., 1934, the parties substituted an agreement to accept the formula of the Minister of Agriculture for ascertaining the manufacturing price. The plaintiffs then contended that the Minister in calculating the manufacturing price has misapplied the formula. The formula is given in the Milk Act, 1934, s. 4 (1) (a), and is: "The cheese-milk price shall be the excess over 1½d. of the average of the prices per lb. at which cheese such as is commonly known at the commencement of this Act as 'New Zealand Finest White' and 'Canadian Finest White' was sold wholesale in Great Britain during the immediately preceding month." Every certificate given by the Minister as to the figure of such cheese-milk price was to state the method by which it was ascertained :—

HELD : (i) it was open to the plaintiffs to contest the method by which the Minister ascertained the cheese-milk price.

(ii) to ascertain the average of the prices per lb. it was necessary to take all such prices and divide the total of them by the number of them and not to add the highest and lowest and divide by two.

(iii) in the view of the trade and upon the correct construction of the section, "Finest White" included "Old Seasons" cheese as these had always been included in the quotations of the London Provision Exchange, Ltd.

(iv) quotations marked "exceptionally" must be excluded from the calculation but the "Old Seasons" quotations were not exceptional.

[EDITORIAL NOTE.] Restriction and control of trade will necessarily require the calculation of average prices for the purposes of marketing schemes and the present case, though it only deals with a particular scheme and a particular trade, no doubt contains much that will be of general application.

FOR THE MILK ACT, 1934, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 27, p. 7.]

By an agreement, dated Sept. 5, 1934, the plaintiffs agreed with the first defendant and the Milk Marketing Board to buy the milk produced by the first defendant's cows from Oct. 1, 1934, until Sept. 30, 1935. It was provided that the Milk Marketing Board should allow to the plaintiffs a rebate off the regional price in respect of every gallon utilised for manufacturing purposes, and that this rebate should be the difference between the regional price and the manufacturing price.

The question between the parties was the determination of the manufacturing price. The relevant provisions and the arguments of the parties are fully set out in the judgment. The actual claim of the plaintiffs was for the return of money paid under a mistake of fact and for declarations declaring the method of ascertaining the manufacturing price.

Sir William Jowitt, K.C., and John Buckley for the plaintiffs.

R. P. Croom-Johnson, K.C., and L. C. Graham-Dixon for the defendants.

BRANSON, J. : This action raised a number of questions as to the construction of a contract entered into between the parties on Sept. 5, 1934, whereby it was agreed with the Milk Board and the plaintiffs to sell and the plaintiffs agreed with Lemon and the Milk Board to buy certain quantities of milk during the year Oct. 1, 1934, to Sept. 30, 1935, at the prices and upon the terms therein specified. Lemon is, in fact, only a nominal party to the action, the questions for decision arising between the plaintiffs and the Board. The first schedule of the contract fixes certain prices for milk sold and consumed in liquid form, and no question arises as to these prices. But clause 8 of the contract provides that in respect of milk used by the purchaser to be manufactured into cheese, butter or condensed milk for export (*inter alia*) the purchaser is to get a rebate calculated "in accordance with the scale" set out in the second schedule.

The material provisions of the second schedule are as follows :

2. The manufacturing price shall be ascertained in relation to the product manu-

factured by reference to the scale following, namely:—(1) Milk manufactured into cheese (other than soft curd cheese and cream cheese). The price per gallon to be the average price per lb. for the previous month of Finest White Canadian Cheese and Finest White New Zealand Cheese less a sum of $1\frac{3}{4}d.$

Then :

(2) Milk manufactured into butter. The price per gallon to be the average price per lb. for the previous month of Finest White Canadian Cheese and Finest White New Zealand Cheese less a sum of $1\frac{3}{4}d.$

Then sub-clause (4) :

Milk manufactured into condensed milk for export. On the same basis as in respect of milk manufactured into cheese with a minimum of $4d.$ per gallon.

Clause 3 of the schedule provides that :

Any manufacturing price may after Oct. 1, 1934, from time to time be varied under the procedure and upon the conditions set out in clause 3 of the first schedule to this agreement and the said clause shall subject to any consequential modifications be deemed to be incorporated in this schedule.

Clause 3 (1) of the first schedule provides :

Subject as hereinafter mentioned the regional price may after Oct. 1, 1934, from time to time during the term be varied either (a) by agreement between the Board and the Central Distributors Committee, or failing agreement (b) on the certificate of a person brought into consultation pursuant to the Agricultural Marketing Act, 1933, s. 13 (hereinafter called "the consulted person").

The form of contract was prescribed by the Board under the Milk Marketing Scheme (Approval) Order 1933, cl. 57, made under the Agricultural Marketing Act, 1931, s. 1 (8). The purpose of the rebate provided for in the contract is to enable home producers of cheese, etc., to compete in the home markets with imports from Canada and New Zealand, its effect is to reduce the price paid by them through the Board to home producers of milk and in order to compensate the latter for this reduction in price the Milk Act, 1934, was passed. Sect. 4 (1) of that Act provided :

(a) The cheese-milk price for any month shall be the excess over $1\frac{3}{4}d.$ of the average of the prices per pound at which cheese such as is commonly known at the commencement of this Act as "New Zealand Finest White" and "Canadian Finest White" was sold wholesale in Great Britain during the immediately preceding month.

The effect, stated quite generally, appears to be that when the rebate off the price of milk allowed under the milk contracts to manufacturers of milk products is large and the price paid to milk producers is consequently reduced the latter get a subsidy to compensate them for that reduction.

In Sept., 1934, the Minister of Agriculture and Fisheries in pursuance of sect. 4 (2) of the Act of 1934 certified cheese-milk prices for the purposes

of that Act, and in accordance with subsect. (3) published his certificate stating the method by which the cheese-milk price had been arrived at. When these prices were published it was noticed that the figures certified for Apr. to Sept., 1934, were always less and therefore more favourable to purchasers of milk than those which had been arrived at under sched. 2 of the milk contracts over the same period.

The plaintiffs had had two previous contracts with the Board and the calculations for rebates under them as under all similar contracts to which the Board was party had been agreed between the Board and Mr. Gosney, the secretary of the National Association of Creamery Proprietors & Wholesale Dairymen, and had been communicated to the plaintiffs and accepted by them as correct without examination into the detail of the calculations.

When it was noticed that the Ministry's calculations produced results more favourable to the purchasers of milk the Central Milk Distributive Committee (wrongly described in the contract as the "Central Distributors Committee") wrote to the Board the letter of Oct. 11, 1934, which is in the following terms :

It was unanimously decided that if the Milk Marketing Board were willing to agree to the formula adopted by the government the Central Milk Distributive Committee would be prepared to accept it.

On Oct. 15, 1934, they received from the Milk Marketing Board the following reply :

It is noted that your committee is prepared to agree to the formula adopted by the government for the purposes of determining the value of milk manufactured into cheese and butter.

The first question for my decision is whether these letters constitute a variation of the manufacturing price in the contract made by agreement between the Board and the Committee under the provisions of sched. 2, cl. 3, which becomes part of the contract and cannot again be altered except by a further agreement or one of the other methods provided by the contract, or whether they amount merely to an arrangement for operating the formula of the schedule made for the time being from which arrangement either party may resile at will upon proper notice. It is conceded that whether it was a mere arrangement or a variation of the schedule it governs the first six months of the contract, but with regard to those six months the plaintiffs contend that they only agreed to accept the Minister's formula and that the Ministry have applied that formula wrongly. The Board, on the other hand, contend that the plaintiffs are bound to accept the figures certified by the Ministry and that if they are not so bound, still that the Minister's formula has been correctly applied.

In my opinion the first of these questions must clearly be answered

in favour of the Board. The language of the second schedule of the contract is so vague that it obviously requires some further definition. What prices are to be taken to find "the average price per lb. for the previous month"? Are they to be wholesale prices or retail prices? Does it mean, as upon the face of it the expression is wide enough to mean, world prices or prices in the United Kingdom or in England or in London? It would be easy to imply a term that the price should be a wholesale price because the contract is for the sale of milk by wholesale. It would be easy also, as the price is called a regional price, to imply a term that only sales of cheese taking place within the region or regions for which the price is to be fixed should be taken into account in arriving at the average price. But even with these limitations other difficulties remain if the words "average price" are given the construction contended for by the plaintiffs. They contend that to find the average price per lb. one must ascertain how many pounds of cheese were sold and for how much money, and then divide the total number of pounds sold into the total sum of money obtained. This would no doubt produce a true mathematical result, but the practical difficulty of obtaining the information necessary to enable the calculation to be done is so appalling that no one can believe that the parties can have meant that it should be attempted.

I am satisfied upon the evidence that no figures are available upon which such a calculation could be based, and I cannot think that business men could ever have contemplated making such an investigation as would be necessary to obtain them from all over England every month for a year. What could be more natural in these circumstances than that business men should agree to substitute for the provisions of sched. 2 some more definite and practical method of arriving at the result they required? In my opinion the parties did so by their letters of Oct. 11 and 15, 1934. There is nothing in those letters to indicate that the agreement thereby arrived at was intended to be of a temporary nature. I consider that these letters constituted a variation of the scale by agreement under sched. 2, cl. 3, which then endured for the term of the contract except in so far as it was again altered in accordance with the provisions of the contract in that behalf.

The method of ascertaining the rebate in respect of milk manufactured into cheese was altered in Apr., 1935, and this carried with it an alteration in respect of milk manufactured into condensed milk for export subject to the minimum of 4*d.* per gallon. This was in fact done by agreement, though in form it was carried out by the machinery of the certificate of the "consulted person." On the 26th of the same month the Central Milk Distributive Committee sought to withdraw from their agreement of Oct., 1934, to accept the Minister's formula so far as it applied to milk manufactured into butter. A correspondence followed in which it

is alleged by the plaintiffs that the Board agreed to such a withdrawal. In my opinion, however, no agreement allowing the plaintiffs to withdraw was ever reached and the plaintiffs remain bound by the agreement with the Central Milk Distributive Committee in Oct., 1934, with respect to milk bought to be made into butter. This finding makes it unnecessary for me to consider further what meaning can properly be given to the words "average price per lb." in the contract itself.

The next point which arises is whether the Central Milk Distributive Committee by their letter of Oct. 11, agreed with the Board not only to accept the formula adopted by the Minister of Agriculture, but also the figures at which the cheese price was certified by him from time to time. In fact the Board notified the plaintiffs each month from Oct., 1934, onwards that "for the purpose of clause 2 of the second schedule to the prescribed form of contract the price of milk . . . will be at the rate of (blank) per gallon," inserting the figure certified by the Minister of Agriculture, and these figures were accepted without checking them or questioning them in any way until Feb. 5, 1935, when questions began to be raised as to the data used by the Minister in his calculations. It was urged that he had been taking into account quotations of Old Canadian Cheese made in 1933 which did not represent as much as 1 per cent. of the cheese sold on the London Market, and that if it was proper to take those quotations into account at all they should be only taken into account with proper regard to the quantity sold. To this the Board replied on Feb. 8, 1935, to the effect that the agreement of October had substituted the price certified by the Ministry under the Milk Act, 1934, for the scale provided by the contract.

It is not now contended that the fact that for four months the parties accepted the price certified by the Ministry prevents the plaintiffs from questioning the correctness of the Ministry's figures, but it was contended that the agreement of October properly construed did preclude them from doing so. This question turns upon the construction of the words "formula adopted by the government" in the letters of Oct., 1934. The Ministry's certificate of Aug. 29, 1934, to which the parties were referring in those letters, recites sect. 4 (1) of the Milk Act and then proceeds to set out "the method by which the cheese-milk prices certified have been computed." I think it plain in these circumstances that by the words "the formula adopted by the government" the parties intended to refer to what is called in the certificate the method by which the price was computed. Sect. 4 (1), if it can be called a formula at all, was not adopted by the government but was imposed by statute, the "method" is a formula and was adopted by the Ministry.

In my opinion, therefore, the plaintiffs agreed that the price to be paid by them was to be ascertained by applying the method adopted by the Ministry in calculating the cheese-milk price under the Milk Act. But

I can find nothing in the letters of Oct. 11 or 15 which prevents the plaintiffs from proving if they can that that method was not properly applied by the Ministry in arriving at the prices certified.

I proceed then to consider whether the plaintiffs have established that the Ministry have misapplied their method. The first complaint is that where more than two quotations appear in the official market report the Minister has taken the sum of all the quotations and divided by the number of quotations given, whereas he should have taken only the highest and the lowest and divided by two. What he said he would do was to examine the range of prices as published by the London Provision Exchange, Ltd., and obtain a "mean price." There is no point in examining a range of prices if only the highest and the lowest of the range are to be used in the calculations, nor do I see how a "mean price" is to be arrived at out of a range of three or four quotations except by taking their sum and dividing by their number. In my view, therefore, the language of the certificate supports the calculation of the Minister and this complaint is unfounded.

The next complaint is that the Minister has included in his calculations quotations for Old Cheese which the plaintiffs contend should have been excluded either as "exceptional quotations" under para. 2 of the "method" or as not being Finest White Canadian at all within the meaning given to that expression by the usage of the trade. The "method" provides for an examination of the range of price quotations as published by the London Provision Exchange, Ltd. Reference to the weekly publications of that body shows quotations in the following forms amongst others: Finest White 51s. 0d. to 52s. 0d.; Finest White 50s. 0d. to 52s. 0d.; Old Seasons 66s. 0d.; Finest June to September make White 55s. 0d., Exceptionally 56s. 0d.; Finest June to September make White 55s. 0d., Exceptionally 56s. 0d.; 1933 Seasons 72s. 0d., all set out on the same line of print. This form of quotation appears to me to show conclusively that in the view of the trade Finest White does not cease to be Finest White when it becomes Old Seasons. The oral evidence called by the plaintiffs entirely failed to displace the evidence afforded by these quotations, and I find as a fact that there is no trade usage by which Finest White becomes something else directly the new Season's Finest White comes on to the market. There is almost invariably a period in each year when both last season's cheese and new season's cheese are on the market together. The Canadian cheese-making season begins in May or June and lasts to about November and the period of overlap depends to some extent upon the date when the new season's make begins to arrive on the market, and to some extent upon the quantity of the old season's make still on hand when that event happens. Before 1935 the period of overlap did not usually extend to more than about ten weeks at most, but in the autumn of 1934 and

spring of 1935 some Canadian makers tried to introduce a line of Matured Finest White, and it was this fact, as the latter of Feb. 5, 1935, shows, that caused the plaintiffs to raise the questions which they have raised before me. They contend that quotations for this Old Cheese are "exceptional quotations" and should have been excluded. The Board, on the other hand, argue that the expression "exceptional quotations" in the "method" refer to those which in the market reports are marked "exceptionally."

In my opinion the Board's contention is the correct one. The practice of the Provision Exchange is to collect information on the market as to the prices of dealings, and when one price is found to be different in any marked degree from the bulk an explanation is demanded, and the price if quoted at all is quoted as "exceptionally" so and so. I think that the "method" dealing as it does with the quotations of the exchange must be referring to quotations so marked when it speaks of "exceptional quotations." I cannot put upon the use of the word "exceptional" instead of the word "exceptionally" the weight which was sought to be attributed to it in the argument for the plaintiffs.

A further reason for arriving at the same conclusion is that whereas quotations of Old Season's Cheese are the rule for certain periods only in most years they became the general rule in 1935, and it would be wrong to treat them as exceptional only upon the ground that in that year they extended over months in which in previous years no such cheese was on the market.

If it is permissible to reinforce my construction by reference to practical difficulties I fail to see how the Ministry not itself dealing on the market but basing itself merely upon the quotations of the exchange, could be expected to discover where a quotation not marked "exceptionally" should be excluded on the ground that it was exceptional.

For these reasons the plaintiffs are not, in my opinion, entitled to any of the declarations which they claim, and the action fails.

Solicitors: *S. L. MacAndrew* (for the plaintiffs); *Ellis & Fairbairn* (for the defendants).

[Reported by FRANK ROWE, Esq., *Barrister-at-Law*.]

THE "HOLSTEIN."

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Sir Boyd Merriman, P.),
July 27, 1936.]

Admiralty—Practice—Action in personam—Writ—Service—General shipping agents in England—Whether agents of particular foreign shipping company.

In a collision case where the procedure *in rem* was not available it was sought in an action brought in *personam* against a foreign shipping company to effect service of the writ through London agents. The agents were general agents for shipping companies and the foreign company in question had no financial interest in the firm nor was any of their staff assigned exclusively to the business of the foreign company. The remuneration was wholly by commission:—

HELD: service on such general agents was bad.

EDITORIAL NOTE. The point in this case is whether the agents are such agents of the foreign company that it can be said that that company is resident in England.

FOR THE LAW ON THE POINT, see HALSBURY, 1st Edn., Vol. 23, Practice, pp. 114, 115, para. 202, and YEARLY SUPREME COURT PRACTICE, 1936, pp. 66-69; and FOR CASES, see DIGEST, Practice, pp. 319-327, Nos. 433-465.]

Cases referred to:

- (1) *The Lalandia*, [1933] P. 56; Digest Supp.
- (2) *Thames & Mersey Marine Insurance Co. v. Societa di Navigazione a Vapore del Lloyd Austriaco* (1914), 12 Asp. M.L.C. 491; 13 Digest 430, 1531.
- (3) *Grainger & Son v. Gough*, [1896] A.C. 325; 28 Digest 35, 185.

MOTION to set aside a writ and the service thereof upon the Hamburg South American Steamship Co., who were sued in respect of a collision with their ship "Holstein." The "Holstein" not having visited these shores since the collision, the ordinary Admiralty jurisdiction *in rem* was not available, and it was sought to proceed *in personam* by the service of a writ upon the company's agents in London.

The details of the agency were set out in an affidavit by the secretary of the firm and the affidavit is fully referred to in the judgment.

H. G. Willmer for the applicants (defendants in the action).

Owen L. Bateson for the respondents (plaintiffs in the action).

SIR BOYD MERRIMAN, P.: This is a motion to set aside a writ and the service of the writ upon the Hamburg South American Steamship Co., whose head office is in Hamburg, and who are sued by the owners of the steamship "Freya" for and in respect of a collision at sea.

It is common ground that the rules relating to service out of the jurisdiction do not apply. It so happens that the ordinary Admiralty jurisdiction *in rem* has not been available, because this particular steamship has not visited these shores since the collision, and it has been sought in those circumstances to serve the Hamburg South American Steamship Co. through their agents in Fenchurch Street; and it is said that that service is bad. If the company are carrying on business here or are

resident here, or, as has been said for short in more than one case, "are here," they can be served through these agents in Fenchurch Street. If not, the writ is bad and the service is bad.

Now I have the facts in this case set out in an affidavit of Mr. John Mitchell Dalgleish, who is the secretary of the company, Stelp & Leighton, Ltd., who act as the agents for the Hamburg South American Line. In substance, with the addition of certain photographs illustrating the position of some of the notices to which reference is made in the affidavit, and with some additional evidence as to what I venture to call a rather optimistic inquiry for the manager of the Hamburg South American Steamship Co. at the offices of these agents in London, this affidavit is accepted as setting out the true facts.

It appears that Messrs. Stelp & Leighton, Ltd., act for, amongst other shipping companies, the Hamburg South American Steamship Co., the head office of which, as I have already said, is at Hamburg. It is common ground, or at any rate it is not disputed, that so far as freight is concerned this company, Stelp & Leighton, Ltd., make no contracts whatever on behalf of the Hamburg South American Steamship Co. in London; though they do the ordinary duties of shipbrokers—to quote the affidavit—such as booking and collecting freights and accepting bill of lading option declarations. As regards passenger tickets, they do issue them; they sign them as agents for the Hamburg South American Steamship Co., and only in that capacity. One fact has been added to those which are stated in the affidavit, namely, this: that in respect of the largest liner of the Hamburg South American Steamship Co. certain berths are actually allotted in advance to these agents in London, and can be disposed of by them without reference to Hamburg. With regard to the whole of the rest of the range of business transacted in London for the Hamburg South American Steamship Co., some reference by telephone or telegraph is necessary before the steamship company can be committed to the allotment of cargo space or of berths as the case may be.

The affidavit goes on that this agency in London has no authority whatever to deal with any claims made against the steamship company, no authority to expend any money or incur any liabilities without their special instructions, and whenever the shipping company attends conferences in which it is interested in London, it sends its own representatives over, and does not attend the conferences through anybody from this particular agency.

Looked at on the other side, Stelp & Leighton pay their own office rent; they have no contribution whatever to that from the steamship company; they are remunerated by a commission. During the last twelve months, it is true that a commission, from being a simple commission on work done, has become a guaranteed commission, but it is still re-

muneration by commission. No office is set aside for the steamship company ; no clerks are specially detailed for the work of the steamship company ; and the affidavit states that the company has no residence, office or place of business registered or otherwise at the offices of Stelp & Leighton, Ltd., nor is there any single clerk or officer who is in the employ of the steamship company. Neither has Stelp & Leighton any interest financially in the Hamburg South American Steamship Co., nor has the Hamburg South American Steamship Co. any interest financially in Stelp & Leighton. And in a word, Mr. Dalgleish, the secretary of the company, says that the company, i.e., Stelp & Leighton, carries on its own business in Fenchurch Street ; it does not carry on the business of the defendants at that address or anywhere, except in the sense that, as part of its own business, this company acts as agents for the defendants in the way that I have already described.

I ought to say, though, by way of qualification, that in past years, though not at present, there has been one exception as regards the employment of clerks. It appears that in connection with the use of some of their steamships for the tours which are so popular at the present time, the Hamburg South American Steamship Co. have sent over or have lent a clerk to this London office to deal with this particular service. That has not been so in the present year, but it is the only exception to the fact I have stated : that there is no employment at Fenchurch Street of any clerk belonging to the steamship company.

Now in these circumstances can it be said that this great and well known German steamship company carries on business or is resident in this country, or, to put it shortly, "is here" ?

Speaking for myself, I consider that this case was disposed of by the decision of LANGTON, J., in *The Lalandia* (1), in connection with similar activities exercised by Messrs. Escombe, McGrath & Co., on behalf of the East Asiatic Co., Ltd. I have looked carefully through the facts in this case and the facts in that as set out very fully in the report and I cannot see any essential difference between the two. I think that was a perfectly plain case, in which the East Asiatic Co. did not carry on business in this country ; and I think that this is an equally plain case ; but in deference to Mr. Bateson's argument, who has pressed me, as counsel in that case pressed LANGTON, J., with a previous decision of the Court of Appeal in the *Thames & Mersey Marine Insurance Co. v. Austrian Lloyd* (2), I will just say a word as to where I think the distinction between the cases lies.

One thing that is quite certain in this line of cases is that ultimately it is a question of fact whether a foreign corporation does or does not reside, carry on business, or exist in the United Kingdom. But, of course, the decision has got to be arrived at with reference to known principles. But first of all it is vital to see what are the facts in any given

case in which, or upon which, the court has come to a conclusion one way or another on this not always easy matter. Now in the *Austrian Lloyd* case (2), I find that amongst other things, leaving aside such unimportant and insignificant matters as the use of a particular number and of a particular name in the telephone book, to which I do not think anybody paid very much attention, in this particular case, the firm which was said to be carrying on the business of the Austrian Lloyd was remunerated, not merely by a commission for freight arranged and steamer tickets supplied, and was not merely reimbursed for its out-of-pocket expenses for postages, but received the sum of £480 a year in addition, which was stated specifically to be for the rent of that part of the premises which was specifically allotted to their business, for the clerks who were separately employed on their business, and for sundry other office expenses. Moreover, in a very special sense, and that not merely as a matter of description, the firm in that case were truly the general representatives of the shipping company in that case; for not merely were they remunerated by a commission for their own services, but they were also remunerated by an over-riding commission on the services of all the other people in the country who performed any services on behalf of the Austrian Lloyd. And in a word, to use the words of BUCKLEY, L.J., as he then was, in the judgment, he says:

The facts here are that for ten years (which is a substantial time), at a defined place, . . . Messrs. Marcus Samuel & Co. in a separate part of the building, by a separate staff of clerks, and with the use of special note-paper bearing the name of the Austrian Lloyd Co., have issued tickets and made contracts for the carriage of passengers and their luggage and goods by steamers belonging to the Austrian Lloyd Co., and have . . . insured . . .

and so forth. He then contrasts that with other agencies, such as Thomas Cook and Son and The International Sleeping Car Company, and says:

The test in each case, is to find the answer to the following question: Does the agent in carrying on the foreign corporation's business make a contract for the foreign corporation, or does the agent, in carrying on the agent's own business, sell a contract with the foreign corporation? In the former case the corporation is and in the latter it is not carrying on business at that place. Marcus Samuel & Co. do the former; Thomas Cook and Son do the latter.

Now Mr. Bateson in his argument said that that passage referred and could refer only to the fact that, as was stated in that case—the accepted facts in that case, at p. 491:

In practice the agents were often allotted a limited number of berths on a steamer, but apart from this they could not allot berths and book any freight without telegraphing to the defendants.

Mr. Bateson says BUCKLEY, L.J., made the test, and the decisive test that that circumstance such as was pointed out was common with this case, on the admission of Mr. Willmer, namely that in certain

cases, though, speaking generally, they have to telegraph for instructions, that in certain cases they have berths allotted to them which they could dispose of at once. He says that is what BUCKLEY, L.J., meant by his judgment: that when you once get that circumstance—he did add “providing the other circumstances in the case are such as to give room for that implication”—it is decisive.

Now I cannot think that that is what BUCKLEY, L.J., meant in that case. I read his judgment as meaning that when, reviewing the circumstances as a whole, you come to the conclusion that taking one thing with another, not in one case, not in one class of cases, but taking all the circumstances into account, it is the agency in this country which is making the contract, then you get a case in which the foreign corporation is carrying on business in this country. When, on the other hand, you find that the agency is merely selling the foreign corporation's contract, then the foreign corporation is not carrying on the business in this country; and I think that it meant exactly the same thing, expressed in slightly different words—though I think it is really expressing the same intention—as LORD HERSCHELL meant in the well known Inland Revenue case, *Grainger & Son v. Gough* (3), with regard to Messrs. Roederer's champagne.

The whole question is whether the foreign corporation is trading with this country or is trading within this country. In the former case it is not, in the latter case it is, amenable to taxation in this country; and speaking for myself, I cannot see that there is any real distinction between the line of reasoning which would lead to the conclusion that the company was carrying on business in this country for the one purpose or for the other purpose. I do not think that BUCKLEY, L.J., in the *Austrian Lloyd* case (2) was taking as decisive the mere fact that in certain cases, apart from anything else, the agents had the right to make the final booking of passenger berths. If one looks at it as a matter of common sense, it cannot be so. There are only a certain number of berths in a steamship. Somehow or other, before a contract is made in London, when corresponding contracts can be made in Hamburg, Paris or a dozen other different places, for any given voyage or series of voyages, by one or more ships—somehow or another there has to come into play a co-ordinating mind which is able to say that berth A31 or B99 has not already been booked for someone; and it does not seem to me to make the slightest difference whether, with regard to the booking of any given berth the particular agent in Hamburg, Paris, London, or anywhere else has to telephone or telegraph to that particular co-ordinating authority before allocating a particular berth to a particular passenger, or whether, on the other hand, because it is known that a certain number of berths will necessarily be required from England, or Paris or wherever the place may be, they say in advance with reference to that particular

ship, that "berths Nos. 1 to 50 may be allotted without specific instructions on your own authority." That, taken by itself, cannot possibly make a difference whether the foreign corporation is or is not carrying on a business in this country, or whether it is on the other hand merely trading with this country. And I think myself, if I had to judge the *Austrian Lloyd* case (2) as a question of fact, I should have thought far the most important fact in that case was the fact that to all intents and purposes the Austrian Lloyd rented an office in this country through Messrs. Marcus Samuel, or at any rate rented part of an office and employed part of a staff of clerks, and paid for them as such, and that having done that, they remunerated their representatives in this country not merely for the work which they did, but for the work which everybody else in this country did : in other words, put them in the position of being their *alter ego* in this country.

But it is sufficient for me to say that there are quite plain distinctions between this case and the case of the *Austrian Lloyd* (2) decided in 1914 ; and if I might hazard a guess, just as in the champagne cases which were originally decided one way, the facts had changed by the time *Grainger & Son v. Gough* (3) came to be decided, so if I had to guess I should think that in that interval between the year 1914 and the year 1933, when *The Lalandia* (1) was decided, foreign companies for precisely the same reason had, not only in connection with shipping cases but also in connection with income tax, decided to make their position perfectly secure from the inroads of the Inland Revenue as well as from hostile litigants ; and that is why, I have no doubt, the facts of this case can, with a few exceptions, almost be stated in the same language as that used by Mr. McGrath in *The Lalandia* (1). I come back to that. In my opinion there is absolutely no distinction between the two. This is a perfectly plain case, in which there is not the slightest ground for saying the Hamburg South American Steamship Co. is carrying on business in this country. The writ and service must be set aside.

If I had to hold that the writ was good I would have to consider that which is now academic and on which I do not intend to waste time, i.e., whether by serving someone who happens to be the secretary of Stelp & Leighton, Ltd., but who is himself not in any way employed under the Hamburg South American Steamship Co., the service of the writ would have been good, even if the writ itself had been properly made out. In my opinion this writ must be set aside with costs.

Solicitors : *Bentleys, Stokes & Lowless* (for the applicants) ; *Thomas Cooper & Co.* (for the respondents).

[Reported by REGINALD TOWNSEND, ESQ., Barrister-at-Law.]

IN THE ESTATE OF MUSURUS, DE *Applied. Re MALDONADO*
[1953] 2 All E.R. 300.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Sir Boyd Merriman, P.),
June 30, 1936.]

*Conflict of Laws—Succession—Intestacy without heirs—Turkish domicile of
intestate—Personal property in England—Bona vacantia.*

A Turkish woman domiciled in Turkey died intestate and without heirs in 1915, leaving, *inter alia*, certain personal property in England. The British Crown claimed that as this property was ownerless in Turkish law, it must be treated as *bona vacantia*. The Turkish government claimed that, under the law of the Ottoman Empire as it was in 1915, the property would have passed to the Bait al-mál, the treasury of the Moslems, which would have applied the property for the relief and benefit of the Moslems, and that as the application of the property was thus limited to certain objects, it was impressed with something in the nature of a trust, and it was impossible to liken it to *bona vacantia*, and it claimed the property. If for any reason the Bait al-mál did not take any un-inherited property, there was no ultimate right in anyone else:—

HELD: (i) the property was ownerless, and the limited application of the property under Turkish law made no difference to its character.

(ii) as the authority by which the Turkish government claimed was in substance the same as that by which the British Crown claimed, the Crown was entitled to the property as *bona vacantia*.

[EDITORIAL NOTE.] *Bona vacantia* is the name given to property to which no one can make a good claim, and is said to be vested by law in the Crown to avoid the strife and contention to which a title arising from mere occupancy might give rise. The distinguishing feature of the property is that it is ownerless, i.e., it has no owner, and not that the owner cannot be found as in the case of lost or abandoned property.

As to *Bona Vacantia*, see HALSBURY, Hailsham Edn., Vol. 6, pp. 827, 828, para. 1202; and FOR CASES, see DIGEST, Vol. 11, p. 587, No. 884.]

Cases referred to:

- (1) *Re Barnett's Trusts*, [1902] 1 Ch. 847; 11 Digest 369, 490.
- (2) *In the Goods of Beggia* (1822), 1 Add. 340; 11 Digest 369, 487.

CROSS-MOTIONS by the Treasury Solicitor and the Councillor of the Turkish Embassy. The facts and arguments are set out in the judgment.

The Attorney-General (Sir Donald Somervell, K.C.) and *John Foster*, for the Treasury Solicitor.

Linton Thorp, K.C., and *Talbot Dyer*, for the Councillor of the Turkish Embassy.

SIR BOYD MERRIMAN, P.: This case is a case which threatened at one time to be somewhat complicated, and has really become perfectly simple. The deceased, a lady, a widow of a former Turkish ambassador to this country, died in Switzerland—although that is immaterial—in 1915; in other words during the old régime of the Ottoman Empire. It is conceded that the law to be applied is the law of the Ottoman Empire as it was in 1915. The question here is, she having died intestate,

whether her personal property in this country falls to the Crown as *bona vacantia*, or whether it goes to the present Turkish government instead. There has been no dispute at all that as regards property in Turkey that unquestionably goes to the Turkish government, and the Crown, needless to say, has made no claim to that, but in this case the Turkish government claim certain assets situate in England and say that their claim is prior to the claim of the Crown as to *bona vacantia*. It is conceded that if the authority by which the Turkish government claim is in substance the same as that by which the British Crown claim that the claim of the Crown would prevail; that is to say, that if the Turkish government are claiming these British assets as what is the equivalent in Turkey of *bona vacantia* the law in this country as laid down in *Re Barnett's Trusts* (1) is that the claim of the Crown would prevail. But it is said that is not the basis of the Turkish government's claim in this case. It has been sought to establish that they claim the assets in the capacity of heirs. I am not going to elaborate the argument about that because it is now conceded out of the mouth of the witness who was called for the Turkish government that that argument is based on a misconception. It is sufficient to say that it is common ground that of the various interpretations of Moslem law as laid down by or based upon the Koran the one that applies at the date and in the Ottoman Empire is the Hanifa rite. Without going through all the details it is sufficient to say that after all possibility of inheritance has been disposed of, after all possible heirs have been got out of the way and it is found that there is no one who can be described as an heir, it is possible for a Turkish testator to leave his property to a universal legatee or legatees. If there is no disposal of the property in that way the ultimate recipient, and I am purposely using a neutral phrase, of the goods of which there is no heir on the one hand, and no legatee on the other, is the Bait al-mál, which is literally the treasury of the Moslems. That public treasury having received the uninherited property, or as it is otherwise described ownerless property, disposes of it through a particular department, namely, the chamber of uninherited property, and in that chamber theoretically and in that branch of the treasury it is disposed of for the relief of those who are sick and poverty stricken, for the benefit of the poor, for succour of the indigent, and helps in the construction of roads and caravanserais where they are not provided for. The whole conception of that is that it will be for the benefit of the Moslems. True you cannot prevent people who are non-Moslems from walking along the roads so provided, but the conception is that it is for the relief in one form or another of Moslems. I am quite satisfied now that it is impossible to talk of that deposit in the Bait al-mál as being anything in the nature of the succession of an heir. There are several reasons which make it impossible so to regard it, but

I am not going through all the reasons because Mr. Avetoom, who has been called for the Turkish government now admits that there is no such conception and it is impossible to say that there is any such conception in the Hanifa rite although there is such a conception in the Shiah rite in the administering of which I gather most of his experience has been, and which he thought was applied. Through this mistaken view of his, cross-examination was directed to the expert witnesses on behalf of the government and they convinced me at the time that their evidence was right and that the cross-examination was wrong, but as I have now got it admitted in terms that there is no such thing as the Bait al-mál succeeding as an heir in the Hanifa rite I need say no more about it.

That point having been got out of the way, and that having been the real substance of the Turkish government's case I now deal with all that remains. It is said that because there is a limited application of this money, that the treasury or the Bait al-mál, or the fourth chamber of the Bait al-mál are restricted in their application of the money, the money thus received by them or thus deposited with them is impressed with something in the nature of a trust for these specified purposes and it is impossible to liken this property to *bona vacantia*. I do not agree with that view in the least. To my mind the real point is the character of the property. The reason why on the one hand goods are *bona vacantia* in this country or why they go to the Bait al-mál in the old Ottoman Empire on the other, is because they are in the strictest sense of the word ownerless. To my mind what matters is not how the goods are disposed of when they get into the treasury, but the capacity in which they come to the treasury, and that capacity is, as I say, because they are without any owner; there is nobody who can succeed to them as an heir; there is nobody to whom they have been disposed as a legatee. It is conceded that if for any reason the Bait al-mál did not take the goods there was nobody else in the Ottoman Empire who could succeed to them; there was no ultimate right in the state in the abstract behind this right of the Bait al-mál. In these circumstances I cannot see that the limited application of the property makes any difference to the nature of the goods themselves as ownerless goods, I cannot see that that makes any real difference as to the capacity in which the treasury takes them. I think that in every real sense of the word the old Ottoman law as it was in 1915 is in substance the same as the law of this country as applied to *bona vacantia*. As KEKEWICH, J., said in the case to which I have referred (p. 859): "It must come back to this: under what circumstances does no succession arise?" Those circumstances have occurred here because it is admitted that in the ordinary sense of the word there is no succession apart from that of the Turkish government. Under what circumstances is the paramount authority entitled to come in and say: "I take"?—because there is nobody else to take. I think that in substance is what occurred and

would have occurred in 1915 under the old Turkish law ; the paramount authority, namely, the treasury, would have taken because there was no one else to take, and I do not think that the fact that the treasury laid down for itself to what channels and to what objects the goods should ultimately be disposed of, prevents those goods from being goods ownerless in the sense that there was nobody else to take them.

I regard in effect the claim which the old Turkish government of that date would have had as being a regalian claim. In those circumstances it does not prevail against the corresponding claim of the Crown in this country, and in my opinion the motion of the Attorney-General succeeds.

The Attorney-General : Subject to what your Lordship thinks proper, I think we should be allowed to take our costs out of the estate and my learned friend's clients should not have costs.

Dyer : As to the Attorney-General's motion, I ask your Lordship to say that it is a proper case where the Councillor should have the costs ; we were brought here to say what we could about the matter, the matter first coming before LANGTON, J., in July, 1933, without notice to us although we were seized of the motion. LANGTON, J., adjourned it for notice to be served on us because he wanted us to have the opportunity of stating the case of the Turkish government. For that reason on the Attorney-General's motion I should submit that we are entitled to our costs. As to the costs of our own cross-motion I do not think I can really press for an order for costs there.

SIR BOYD MERRIMAN, P. : Why do you say you should have any costs on the Attorney-General's motion ?

Dyer : It is a matter which since the case of *Beggia* (2) has never come before the courts, and I submit that we should have the costs in so much as we have been ordered in effect to be here by LANGTON, J., to present what case we can. It was a question which has needed a good deal of research by everybody, and it would be a hardship on the Embassy if they had to bear the costs of giving what assistance your Lordship has had on their behalf.

SIR BOYD MERRIMAN, P. : On the basis that it is a matter of interest to both governments and there is no particular reason why this particular estate should bear the whole brunt of the litigation, I think you had better both pay your own costs.

No order for costs of either motion.

Solicitors : *Treasury Solicitor ; Leader, Plunkett & Leader* (for the Councillor of the Turkish Embassy).

[Reported by J. F. COMPTON MILLER, ESQ., *Barrister-at-Law.*]

AARONSON AND OTHERS v. GHADIEH AND OTHERS.

[PRIVY COUNCIL (Lord Thankerton, Sir John Wallis and Sir George Rankin), July 3, 27, 1936.]

Privy Council—Palestine—Land settlement—Jurisdiction of settlement officer—Right of appeal from decision of settlement officer—Palestine Land Settlement Ordinance, 1928.

A settlement order was issued under the Palestine Land Settlement Ordinance, s. 3, that a settlement of rights in land and registration thereof should be effected in the area included within the boundaries of, *inter alia*, the village of Hudeira in the Haifa sub-district and of the lands of Attil and Zeita in the Tulkarem sub-district. A settlement officer was duly appointed and a preliminary notice issued of the intended settlement and registration of rights in the village of Hudeira. A dispute arose with regard to certain land known as Khor al Wasa', of which the appellants were registered in the land registry of Haifa as absolute owners. The entry in the registry described the area as being within the village of Hudeira. The settlement officer found that the area in dispute was included within the boundaries of Zeita and/or Attil musha' lands, and he ordered that the entries in the Haifa land registry relating to the area in dispute be separated from the entries in respect of the lands of Hudeira, and that an observation be made in respect of such entries that in accordance with the judgment of the settlement officer those lands were held to be situated within the musha' lands of Zeita and/or Attil and were recorded as such in the Tulkarem land registry, and that a corresponding entry be recorded in the Tulkarem land registry. The appellants appealed. The competency of the appeal was challenged on the ground that the decision was not one "as to any right to land" within the Land Settlement Ordinance, 1928, s. 56 (1). The Land Court upheld the competency of the appeal, and dismissed the appeal. On appeal to the Supreme Court, the appeal was held not to be competent and the appellants' application was dismissed. The appellants appealed to the Privy Council:—

HELD: (i) the decision of the settlement officer was a decision as to rights to land in so far as it held that the lands of Khor al Wasa' were musha' lands.

(ii) the judgment of the settlement officer was *ultra vires* in so far as it dealt with questions of rights to land outside the village of Hudeira, which was under settlement, and accordingly the finding that the area of Khor al Wasa', which he held to be outside the boundaries of Hudeira, was musha' land, along with the consequential entries in the land registries of Haifa and Tulkarem, was *ultra vires*.

(iii) in defining the boundaries of the village of Hudeira, the settlement officer was entitled to find that the area of Khor al Wasa' was not in Hudeira, but his judgment ought to be varied by excluding from the findings any finding that the area was musha' land, and also the orders as to entries in the land registries.

[EDITORIAL NOTE.] The decision concerns the jurisdiction of the settlement officer in dealing with the rights in and registrations of land in Palestine.

AS TO THE LAW ON THE POINT, see HALSBURY, Hailsham Edn., Vol. 11, pp. 157, 158, para. 280.]

APPEAL by the defendants, by special leave, from a judgment of the Supreme Court of Palestine (CORRIE, Acting C.J., and KHALDI and

KHAYAT, JJ.), in its appellate jurisdiction, dated Jan. 12, 1933, dismissing an appeal from a judgment of the Land Court of Haifa (SETON, P., and AZIZ, J.), dated July 18, 1932, under which an appeal by the present appellants from an order of the settlement officer, dated June 26, 1931, was dismissed.

The facts of the case appear in the judgment of their Lordships delivered by LORD THANKERTON.

J. M. Gover, K.C., and Wilfrid M. Hunt for the appellants.

The respondents did not appear and the appeal was heard *ex parte* by their Lordships.

LORD THANKERTON : This is an appeal by special leave from a judgment of the Supreme Court of Palestine in its appellate jurisdiction, dated Jan. 12, 1933, dismissing an appeal from a judgment of the Land Court of Haifa, dated July 18, 1932, under which an appeal by the present appellants from an order of the settlement officer, dated June 26, 1931, was dismissed.

Under the Palestine Land Settlement Ordinance, s. 3, as amended, the High Commissioner for Palestine, on Apr. 26, 1929, issued a settlement order, by which it was ordered that a settlement of the rights in land and registration thereof should be effected in the area included within the boundaries of, *inter alia*, the village of Hudeira in the Haifa sub-district and of the lands of Attil and Zeita in the Tulkarem sub-district. By another order of the same date Mr. Francis Goldworth Lowick was appointed settlement officer for the purposes of the above order. On May 14, 1929, the High Commissioner issued another order, which cancelled the first order and reissued it in an amended form. The amendments are not material to the present question. On May 2, 1929, a preliminary notice, in terms of sect. 5 of the Ordinance, was issued of the intended settlement and registration of rights in the village of Hudeira. The village of Hudeira thus became a village under settlement, and the lands comprised within its boundaries became subject to the jurisdiction of the settlement officer.

The present dispute relates to a large area of land, said to extend to between 5,000 and 6,000 donums, and known as Khor al Wasa'. At this time the appellants were registered in the land registry of Haifa as absolute owners of an area extending to between 5,000 and 6,000 donums, and forming part of Khor al Wasa', and were the holders of Kushans or title deeds issued to them by that land registry, which certified their registration as such. The entry in the register describes the area as being within the village of Hudeira. On Dec. 2, 1929, and Sept. 9, 1930, statutory notice was given that settlement and registration of rights was about to commence as to certain blocks of land in the village of Hudeira, including the blocks of which the appellants were the registered

owners. The appellants then duly submitted memoranda of their claims to these blocks to the settlement officer. Thereafter the settlement officer held a prolonged public inquiry, generally at Hudeira, on various dates from Nov. 5, 1930, to June, 16, 1931, and he delivered a considered judgment on June 26, 1931, from which it is convenient to take his description of the parties before him and their claims :

This action has been brought to decide whether an area of land known as the Khor al Wasa' stated to consist of between 5,000 and 6,000 donums lies within the boundaries of Hudeira and is thus within the jurisdiction of the settlement officer, Jaffa settlement area, in virtue of a settlement notice published by him on May 2, 1929 (*vide* Official Gazette No. 235 of May 16, 1929, p. 537) under the Land Settlement Ordinance, 1928, s. 5, in respect of Hudeira village, the effect of which being that jurisdiction in actions concerning rights to land within the boundaries of the said village of Hudeira is conferred on the settlement officer according to the provisions of sect. 6 of the said Ordinance.

The plaintiffs are persons who claim that the area in question lies within the boundaries of the village of Zeita (Tukarem sub-district) and forms part of the *musha'* lands of Raml Zeita. At a later stage, namely, on May 19, 1931, 73 additional claimants who made a similar claim were entered as third parties. The third parties are Abdel Fattah es Samara and partners who subsequently withdrew their claim and representatives of Attil village (Tulkarem sub-district) who claimed that a part of the area is included within the boundaries of their village.

The defendants claim that the land in question is within the boundaries of Hudeira and is their property in virtue of registration in the land registry of Haifa.

In the view that their Lordships take, it is unnecessary to consider either the question of the boundaries of Hudeira or the question of title to the area in dispute on its merits, but it may be explained that the present appellants obtained a judgment of the Haifa Land Court in their favour in 1925, under which the entry in their favour in the Haifa land registry was directed to be made, while the respondents hold a judgment of the Nablus Land Court in their favour, which they claim applies to the area in dispute. Further, the questions of village boundaries and of title are inter-related to some extent for, if the area in dispute is village *musha'* of the village of Zeita or the village of Attil, it seems clear that it cannot be within the boundaries of the village of Hudeira.

After dealing with the evidence and arguments in detail, the settlement officer stated his conclusions as follows :

The settlement officer therefore concludes that the whole area of Khor al Wasa' lies outside the boundaries of the Hudeira-Infat Kushans and is thus included within the kushan boundaries of Raml Zeita. It is clear that the judgments of the Nablus Land Court in 1923-1924 which applied to the Raml Zeita as registered in the kushan included the same land as was the subject of the judgment of the Haifa Land Court in favour of Abdel Fattah Mar'i Samara in 1925. Although the question of the correct boundaries of Raml Zeita was not an issue before the Nablus Land Court, it is clear from the petition of claim that the judgment related to the lands included in the Kushan of Raml Zeita. The settlement officer is thus faced with the task of deciding which of these two conflicting judgments is the better

judgment. The settlement officer finds that the land in dispute was situated within the jurisdiction of the Nablus Land Court, while the Haifa Land Court was induced to assume jurisdiction by deliberate misrepresentation by the parties before it.

The settlement officer finds that the boundaries of Hudeira on the east and south are as shown in the Vilbushevitch map and as indicated by a blue line in the map illustrating this judgment and that accordingly the whole area of Khor al Wasa' in dispute in this action is included within the boundaries of Zeita and/or Attil musha' lands. He has thus no jurisdiction to consider the claims of the defendants who have purchased parcels of land in Khor al Wasa' from Toba Rutman and Rifka Aaronson. But as the lands of Khor al Wasa' are included in the land registry of Haifa as being a portion of Hudeira and as the registers of Hudeira are superseded as result of the issue of a settlement notice regarding Hudeira on May 2, 1929, he orders that the entries in respect of Khor al Wasa' in the said land registry of Haifa be separated from the entries in respect of the lands of Hudeira and be described as Khor al Wasa' and that an observation be made in respect of such entries that in accordance with the judgment of the settlement officer, Jaffa area, in case No. 92/30, these lands are held to be situated within the musha' lands of Zeita and/or Attil and are recorded as such in the land registry of Tulkarem, and that a corresponding entry be recorded in the land registry of Tulkarem in respect of all entries relating to Raml Zeita and/or Attil, to the effect that a portion of this land known as Khor al Wasa' is also registered in the Haifa land registry.

The present appellants appealed from that judgment, with the leave of the settlement officer, to the Land Court, Haifa. The competency of the appeal was challenged, but it was upheld by the Land Court on Nov. 26, 1931, by a judgment as follows :

The judgment of the settlement officer appears at first sight merely to decide the boundaries of Hudeira on the south and east but in arriving at this decision the settlement officer states that he has come to the conclusion that Khor al Wasa' is within the Kushan boundaries of Raml Zeita and that the judgment in the Haifa Land Court was obtained by corrupt, deliberately misleading and improper methods. The appellants' right to the land in dispute is affected undoubtedly by the two latter decisions and the settlement officer having given leave to appeal, we hold that an appeal lies under the Land Settlement Ordinance, 1928, s. 56 (1), and we overrule the respondents' preliminary objection to the contrary.

Thereafter, the Land Court delivered judgment on July 18, 1932, dismissing the appeal. After some comment on the proceedings before the settlement officer, the judgment proceeds as follows :

In the end, the settlement officer found that the land in dispute was not within the boundaries of Hudeira and that he had no power to deal with claims in respect of the same, since his jurisdiction was limited to Hudeira. On the face of it, this seemed to be a decision which prejudiced nobody and we had considerable difficulty at first in convincing ourselves that any appeal lay from it. No indication is given in the Land Settlement Ordinance as to what are to be considered the boundaries of a village and so long as the rights of individuals are not affected it does not seem to us to matter very much how the settlement officer decides the question. If his decision is inconvenient, machinery exists by means of which it can be amended, administratively, after land settlement has been completed.

However, upon closer examination, it will be observed that the judgment of

the settlement officer consists of two parts, firstly, a finding as to the boundaries of Hudeira made under the Land Settlement Ordinance, 1928, s. 12, and, secondly, a decision that Khor al Wasa' does not lie within the boundaries of Hudeira as recorded in the original Kushans of Hudeira.

The latter decision seriously affects the rights of the appellants, the more so since the settlement officer has ordered that the entries in respect of Khor al Wasa' in the Haifa land registry shall be separated from the Hudeira entries and an observation made in respect of the former that in accordance with the judgment of the settlement officer, Jaffa area, in case No. 92/30, these lands were held to be situated within the musha' lands Zeita and/or Attil.

With regard to the first decision, as has been mentioned before, the Land Settlement Ordinance nowhere lays down what the boundaries of a village are to be deemed to be nor does it say what factors should be taken into consideration in coming to a decision on the subject. In this case, the settlement officer has excluded Khor al Wasa' from Hudeira because, as he found it, it was not included in the original Kushans of Hudeira. We do not propose to overrule him on this point because his decision does not affect the right or title of any individual who is a party to this action; on the other hand, if we had to make the decision ourselves, we think that we should have paid regard more to the present state of affairs rather than to that of many years ago. To-day Khor al Wasa' is to all intents and purposes a part of Hudeira and is likely to remain so whatever may be the outcome of the dispute as to title; further, since the year 1925, it has been treated by the government as being part of Hudeira and consequently within the Haifa sub-district and not within the sub-district of Tulkarem. For these reasons it seems to us that it would have been more convenient to have kept it within Hudeira for the purposes of land settlement, and so we should have decided, had the question any practical value for the parties to this action.

With regard to the second decision, namely, that Khor al Wasa' does not lie within the boundaries recorded in the original Kushans of Hudeira, there is ample evidence in the careful and competent investigation made by the settlement officer to confirm this finding and we uphold the same accordingly.

The appellants, on the question of title, have still another string to their bow because they have acquired the rights of the government in Khor al Wasa' which the government claims was declared Mahlul during the Turkish regime. This question has still to be determined.

In the result, the appeal fails and is dismissed: no order is made as to costs. Judgment delivered in the presence of the parties and subject to a right of appeal upon a point of law.

An appeal by the present appellants to the Supreme Court of Palestine was dismissed by a judgment of that court on Jan. 12, 1933. After referring to the decision of the settlement officer, the judgment proceeds as follows:

From what source the settlement officer derived authority to give such directions, does not appear; but that is not a matter with which we have at present to deal. The question that first presents itself is whether the settlement officer's decision is appealable or not. The only provisions as to appeal contained in the Land Settlement Ordinances are those of the Land Settlement Ordinance, 1928, ss. 56, 57 and 58, as amended by the Land Settlement Ordinance, 1930, s. 16: the first paragraph of sect. 56 (1) as amended is as follows:

"No appeal shall lie from the decision of a settlement officer as to any right to land save with the leave of such officer or of the president of a Land Court."

Sect. 57 defines the powers of the Land Court with regard to an appeal. Sect. 58 contains provisions with regard to an appeal from a "decision recorded" in the schedule of rights or the partition schedule. Unless therefore the decision of the settlement officer now in question is "the decision of a settlement officer as to any right in land," or is a decision recorded in the schedule of rights or the partition schedule, there is no provision for any appeal to be made from it. Clearly this is not a decision entered in a schedule of rights or partition schedule; the question that remains is, is it a decision as to any right in land?

This question was argued before the Land Court which held that the decision was subject to appeal on the ground that the decision that Khor al Wasa' does not lie within the boundaries of Hudeira, as recorded in the original Kushan of Hudeira "seriously affects the rights of the appellants, the more so since the settlement officer has ordered that the entries in respect of Khor al Wasa' in the Haifa land registry shall be separated from the Hudeira entries and an observation made in respect of the former that in accordance with the judgment of the settlement officer, Jaffa area, in case No. 92/30, these lands were held to be situated within the musha' lands of Zeita and/or Attil."

This view is supported by the appellants who allege that their case depends upon a finding that the land in question forms part of the lands of Hudeira. But even if such be the case there is a clear distinction between a decision which affects rights in land and a decision as to any right in land. Every relevant finding of fact made by a settlement officer is a decision affecting rights in land, in that it may be the basis of a decision as to those rights. It does not follow that any such decision can be the subject of an appeal apart from the decision as to rights in land based thereon. The decision that the lands of Khor al Wasa' are within the musha' lands of Zeita or of Attil, while it may affect rights in land by forming the basis of a decision as to such rights, is not in itself a decision as to such rights.

Again, the directions given by the settlement officer as to the entries to be made in the old registers, are not decisions as to rights in land. The same persons as before remain registered as owners of the same rights in the same plots of land after such entries are made. There is thus, at present, no decision before the court against which an appeal can lie, and the appellants' application must be dismissed.

The present appeal is by special leave; the respondents have not appeared and the appeal was heard *ex parte* by their Lordships. Special leave was granted on the undertaking that the settlement officer's decision as to the boundaries should not be questioned in the appeal, as it was an administrative question, and that the appeal should be confined to a challenge of his decision in so far as it affected the title of the appellants. Their Lordships are clearly of opinion that the settlement officer's decision was a decision as to rights to land in so far as it held that the lands of Khor al Wasa' are musha' lands, a finding that necessarily excluded the title relied on by the appellants. This appears to be the ground on which the Land Court upheld the competency of the appeal to their court. Their Lordships have difficulty in appreciating the fine distinction drawn by the Supreme Court in holding the appeal incompetent.

In the next place, their Lordships are clearly of opinion that the judgment of the settlement officer was outside his jurisdiction, and *ultra*

vires, in so far as it dealt with questions of rights to land outside the village of Hudeira, which was under settlement, and that, accordingly, the finding that the area of Khor al Wasa', which he held to be outside the boundaries of Hudeira, was musha' land, along with the consequential directions as to entries in the land registries of Haifa and Tulkarem, was *ultra vires* of the settlement officer. It is remarkable that the settlement officer made these findings in spite of the correct view expressed by him as to the extent of his jurisdiction. The Land Court would appear to have accepted this view also, but they equally failed to give effect to it. The Supreme Court only considered the competency of the appeal. In defining the boundaries of the village of Hudeira, the settlement officer was entitled to find that the area of Khor al Wasa' was not in Hudeira, but within the boundaries of Zeita and/or Attil; that was a purely administrative finding. But, in the opinion of their Lordships, the judgment of the settlement officer of June 26, 1931, ought to be varied by excluding from the findings any finding that the area of Khor al Wasa' is musha' land, and also the orders as to entries in the land registries of Haifa and Tulkarem.

Counsel for the appellants asked that the case should be sent back to the Land Court in order that the Land Court should proceed to hear the appeal to them on the question of the boundaries of Hudeira, but the judgment of the Land Court makes clear that they were not prepared to interfere with the decision of the settlement officer on this point, and their Lordships are of opinion that the case should not be sent back.

It is right that their Lordships should make clear that their decision is confined to the question of the jurisdiction of the settlement officer in settling the village of Hudeira; it does not involve any expression of opinion on the merits of the appellants' claim to part of Khor al Wasa'. The matter will be entirely open to the settlement officer, when the villages of Zeita and Attil are under settlement.

Their Lordships will accordingly humbly advise His Majesty that the appeal should be allowed, that the judgment of the Land Court of Haifa, dated July 18, 1932, and the judgment of the Supreme Court of Palestine, dated Jan. 12, 1933, should be set aside, and that the judgment of the settlement officer, dated June 26, 1931, should be varied by excluding from the findings any finding that the area of Khor al Wasa' is musha' land, and also the orders as to entries in the land registries of Haifa and Tulkarem. The appellants will have the costs of this appeal and their costs in the Land Court and the Supreme Court from the respondents.

Appeal allowed with costs. Judgment of the settlement officer varied.

Solicitors: Stoneham & Sons (for the appellants).

[Reported by T. A. DILLON, ESQ., Barrister-at-Law.]

LEEMAN v. MONTAGU.

[KING'S BENCH DIVISION (Greaves-Lord, J.), July 8, 9, 10, 1936.]

Nuisance—Adjoining owners—Noise—Poultry farm.

The plaintiff purchased a house in a partly rural, but largely residential district. Adjoining this house was a poultry farm, and about 100 yards from the plaintiff's house was an orchard in which the poultry farmer kept large numbers of cockerels. The plaintiff complained of the noise made by the cockerels in the early mornings, and threatened proceedings unless they were removed. The cockerels were removed, but after some months numbers of cockerels reappeared and the farmer made no attempt to rearrange his farm so as to keep the cockerels further from the plaintiff's property. The plaintiff brought an action for an injunction :—

HELD : a nuisance had been proved and an injunction should be granted.

[EDITORIAL NOTE. Cases of nuisance usually raise a difficult question of degree, since practically everything that is held to be a nuisance is a trade or business that has to be carried on somewhere. The question, therefore, is as to what degree of nuisance is to be tolerated in particular circumstances and the present case defines with some precision the position with regard to poultry farms. The interesting question of the introduction of gramophone records as a means of proof is raised, but not decided.

FOR THE LAW ON THE POINT, see HALSBURY, 1st Edn., Vol. 21, Nuisance, p. 531, para. 899, and FOR CASES, see DIGEST, Vol. 36, pp. 166-168, Nos. 78-98.]

ACTION for an injunction to restrain the defendant from carrying on his business of poultry breeder at Black Lake Farm, Thorpe, in such a manner as to be or cause a nuisance to the plaintiff and unlawfully to interfere with the plaintiff's occupation and enjoyment of Thorpe Cottage, Thorpe, and for damages. Thorpe is partly rural, but largely a residential district. The defendant's farm adjoined the plaintiff's property, and an orchard, in which the defendant kept a number of cockerels, was about 100 yards from the plaintiff's house. The plaintiff bought Thorpe Cottage in Sept., 1935, and went to live there with his wife on Oct. 1, 1935. The plaintiff and his wife were awakened at 2 a.m. by the crowing of the cockerels. There were at that time some 750 cockerels in the orchards. The noise continued until 7 or 8 a.m., and it was repeated on the following night. Neither the plaintiff nor his wife could sleep. The plaintiff spoke about the noise to the defendant, who said he was selling cockerels daily and hoped to have sold them all by the end of October. The plaintiff and his wife went away for a few days, but on their return they still found the noise unbearable and were compelled to sleep with cotton wool in their ears and the windows closed. There was some correspondence between the parties, and on Nov. 6 the plaintiff gave the defendant fourteen days in which to move the cockerels. The cockerels were duly moved by Nov. 20 and the plaintiff wrote that if the nuisance was repeated he would take action.

There was no noise until May 6, 1936, when the defendant put some 200 cockerels in the orchard, whereupon these proceedings were brought.

The defendant had spent a large sum of money on his farm, the cockerels were the most important part of his business financially, and and it was his opinion that he could not rearrange the farm so as to move the cockerels away from the plaintiff's property.

The previous owner of Thorpe Cottage did not leave the place solely because of the noise, though he compared the sound to that of a football crowd cheering a cup-tie. The opinion of a poultry expert was that the farm could be rearranged without difficulty. A witness gave evidence of having gone to Thorpe Cottage for the purpose of making gramophone records of the noise, which he likened to three cornets, two of which were out of tune. On behalf of the defendant, it was submitted that these records were inadmissible. Without ruling them inadmissible, his Lordship decided not to hear the records.

On behalf of the defendant a previous owner of Thorpe Cottage stated that he had suffered no inconvenience from noise, and a person who always spent the summer in Thorpe in a house not more than some 40 feet further from the orchard than the plaintiff's house, had no recollection of ever having been awakened by the cockerels. A nurseryman, who lived about 200 yards from the orchard had never been disturbed by the cockerels, though he could hear them if he listened. Expert evidence was given to the effect that the defendant's farm was one of the best laid out in England.

J. W. Morris, K.C., and F. W. Beney, for the plaintiff.

F. K. Archer, K.C., and P. B. Morle, for the defendant.

GREAVES-LORD, J., found that there was a nuisance as alleged and granted the injunction asked for. He added, however, that he would not regard it as a breach of the injunction, without much more definite evidence, if the defendant were to use the land even up to the top end of the orchard by normal breeding pens populated in the ordinary way. The injunction was suspended for one month, subject to the defendant taking active steps to reduce the nuisance.

Judgment for the plaintiff for an injunction and for 20s. damages. Liberty to apply.

Solicitors: *Croft & Russell* (for the plaintiff); *A. E. Hamlin, Brown & Co.* (for the defendant).

[Reported by T. A. DILLON, Esq., Barrister-at-Law.]

THE COMMISSIONER OF INCOME TAX, BOMBAY
PRESIDENCY AND ADEN, AND OTHERS v. THE
BOMBAY TRUST CORPORATION, LTD.

[PRIVY COUNCIL (Lord Atkin, Lord Thankerton, Sir Shadi Lal, Sir George Rankin and Sir George Rich), **June 11, 12, 15, July 17, 1936.**]

Income Tax—Valid assessment on loan interest—Alteration of company's loan arrangements—Continuation of assessment—Necessity for authorities to show rearrangement not a real transaction.

The Hong Kong Trust Corporation Ltd., lent money to the Bombay Trust Corporation Ltd., and the latter paid interest thereon. In respect of this interest the Hong Kong company was assessed to income tax in the name of the Bombay company as its agent under the Indian Income Tax Act, 1922, ss. 42 (1) and 43, and such assessment was held good on appeal to the Privy Council. The loan was paid off through a common banker and a new loan from Arnold and Co. in China was substituted for it. All these companies, including the bankers, were closely associated companies and their share capitals were held almost exclusively by one family. The income tax authorities at Bombay disbelieving the reality of the transactions continued to assess the Hong Kong company in the name of the Bombay company as its agent :—

HELD : all the evidence went to show that the transaction by which the lender was charged was a real one and as the tax authorities were unable to prove the contrary by evidence the assessment was invalid and must be discharged.

[EDITORIAL NOTE.] The point here is of general interest, although only Indian income tax is dealt with. It is much to the advantage of wealthy companies which are closely associated by reason of their share capital being largely held by one family or set of directors to arrange their transactions so as to avoid payment of tax. There has long been authority for the statement that such avoidance of tax is a perfectly legal procedure and the present case carries the doctrine perhaps a stage further. Transactions are to be presumed to be legal unless they can be shown by evidence to be illegal and in income tax matters transactions are to be treated as real and not fake transactions unless there is evidence to prove their unreality. The authorities are not entitled to assume from the close relationship between companies that book entries misrepresent the transaction. They must show by evidence that there is such misrepresentation, and unless that evidence is produced they must accept the book entries and their legal result.

FOR THE LAW ON THE POINT, compare HALSBURY, Hailsham Edn., Vol. 17, pp. 253, 254, para. 515; and FOR CASES, see DIGEST, Vol. 28, p. 109, No. 671 and Supp.]

APPEAL by the Commissioner of Income Tax, Bombay Presidency and Aden, from a judgment of the High Court at Bombay, dated Aug. 29, 1933. Two consolidated appeals were heard together, but only the first is reported. The facts appear in the judgment of their Lordships delivered by SIR GEORGE RANKIN.

A. M. Dunne, K.C., and Sir Thomas Strangman for the appellant.
Raymond W. Needham, K.C., and Reginald Hills for the respondents.

SIR GEORGE RANKIN : In this case two appeals from the High Court

at Bombay have been consolidated. Both appeals are brought by income-tax authorities and both arise out of proceedings to assess a company registered outside British India called the Hong Kong Trust Corporation, Ltd. (herein referred to as the Hong Kong company), to income-tax in respect of the year of assessment 1928-1929. The income-tax authorities have claimed to be entitled to assess the Hong Kong company in the name of the Bombay Trust Corporation, Ltd. (herein called the Bombay company), as its agent under the Indian Income-tax Act, 1922, ss. 42 (1), 43, that is, upon the footing that in the year 1927 profits and gains accrued or arose to the Hong Kong company through its business connection with the Bombay company. The income-tax officer having on Mar. 29, 1930, made an assessment upon this footing the matter came on appeal from him before the assistant commissioner. The assistant commissioner, on July 12, 1930, confirmed the assessment. The Bombay company having requested the commissioner to make a reference to the High Court under sect. 66 of the Act, the commissioner, on Mar. 2, 1931, exercised his powers of review under sect. 33, and remanded the appeal for a fresh decision by the assistant commissioner after taking certain further evidence. In the end the assistant commissioner on Oct. 9, 1931, assessed the Bombay company as agent of the Hong Kong company upon a sum of Rs.20,50,000, which involved a liability to tax, including super-tax, of Rs.3,17,187-8-0. On Dec. 8, 1931, the Bombay company again applied to the commissioner for a reference of certain questions of law to the High Court. This the commissioner refused to do, but upon application made to the High Court for an order under sect. 66 (3) the High Court by order dated Oct. 6, 1932, required the commissioner to refer the following question of law :

Whether there was any evidence to justify the finding of the assistant commissioner that for the year of assessment, profits and gains accrued or arose to the Hong Kong Trust Corporation through its business connection with the Bombay Trust Corporation.

The Bombay company had in the meantime, on Apr. 6, 1932, paid under protest Rs.3,17,187-8-0 the amount of the tax assessed. The commissioner having stated a case for the opinion of the High Court upon the question propounded, and having further stated his opinion that the question should be answered in the affirmative, the High Court on Aug. 29, 1933, gave judgment answering the question in the negative, and directing the costs of the reference to be paid to the Bombay company. It is from this decision that appeal No. 1 of 1936 has been brought, and their Lordships will first deal with this appeal.

The main evidence upon the question whether in the year 1927 sums of money were paid by the Bombay company to the Hong Kong company by way of interest upon money lent consists of entries in the books of the Bombay company. Exhibited to the case stated by the com-

missioner are extracts from the ledger of the Bombay company taken from the accounts of the Hong Kong Trust Corporation, Ltd., "Fixed Deposit Account" and "Call Loan Account" and of E. D. Sassoon and Company, Ltd., "Shanghai Loan Account" and "Shanghai Current Account." These books show clearly enough that until Nov. of the year 1926 the Bombay company was borrowing money in large sums from the Hong Kong company at $5\frac{1}{4}$ per cent. interest upon fixed deposit, that is, in every case or almost every case, upon deposit for one year certain. In 1924, 1925 and for almost the whole of 1926 different sums are shown as being lent for one year upon different dates, and interest thereon is shown as remitted to the Hong Kong company by debits to the account of the Bombay company in the books of E. D. Sassoon and Company, Ltd., at Shanghai, who were bankers to both parties.

It is not open to dispute that in Oct., 1926, the income-tax authorities served a notice upon the Bombay company to show cause why it should not be treated as an agent of the Hong Kong company under sect. 43. From documents which are in evidence it is further clear that on Oct. 27, 1926, the Bombay company telegraphed to the Hong Kong company to inquire whether they were agreeable to all their deposits with the Bombay company being on call as from the dates of the deposits. On Oct. 28 a reply was received from the Hong Kong company agreeing to this proposal. On Nov. 13, the Hong Kong company telegraphed requiring repayment of their deposits amounting to Rs.11,04,85,918 through Messrs. E. D. Sassoon and Company, Ltd., of Shanghai. On Nov. 16 and 17 the income-tax officer came to a finding that the Bombay company should be held to be agent of the Hong Kong company and called for a return upon that footing. On Nov. 19 the Bombay company wrote to Messrs. E. D. Sassoon and Company, Ltd., of Bombay, asking them to remit to Messrs. E. D. Sassoon and Company, Ltd., Shanghai (whom their Lordships will refer to as the Shanghai branch), the sum of Rs.11,42,29,931-10-9. They also wrote to the Shanghai branch advising that they had remitted this amount through Messrs. E. D. Sassoon and Company, Ltd., Bombay, the amount being made up as follows :—

	Rs.	a.	p.
Amount of Call Loans repaid by you on our behalf ..	11,04,85,918	0	10
Interest on above ending Nov. 16, 1926	37,44,013	9	11
	11,42,29,931	10	9

On the same day also the Bombay company wrote to the Hong Kong company saying that they had advised Messrs. E. D. Sassoon and Company, Ltd., Shanghai, to credit their account with these sums.

In complete accordance with this correspondence entries are made by the Bombay company in their ledger. Thus an account called the

“ Hong Kong Trust Corporation, Ltd., Call Loan Account ” is opened with a credit entry of Nov. 13, 1926, showing sums amounting for interest and principal to the figure already mentioned on the footing that the principal loans were taken originally as fixed deposits for one year and are now converted into call loans. On the debit side of this account there is an entry dated Nov. 17, “ to E. D. Sassoon and Company, Ltd., for amount being repayment of loans with interest ending Nov. 16, 1926.” The “ E. D. Sassoon and Company, Ltd, Shanghai Loan Account ” shows at the same time a credit to the Shanghai branch “ for amounts borrowed by E. D. S. & Co., Shanghai, on our account being equivalent of Taels 6,50,00,000 at exchange 170 bearing interest at $5\frac{1}{4}$ per cent. per annum ” together with a credit of interest to the end of the year upon this loan. Within a short time, namely, on Dec. 6, 1926, an entry states that three out of the six and a-half crores of taels borrowed were repaid to the Shanghai branch. Throughout 1927 entries are made upon the footing that there are no longer any sums received on loan from the Hong Kong company in respect of fixed deposits, call loans or otherwise, but that the Bombay company has received from the Shanghai branch a loan in taels on which interest at $5\frac{1}{4}$ per cent. is being paid. When the present matter was first before the assistant commissioner he requested the Bombay company to obtain a declaration from the Hong Kong company and from Messrs. E. D. Sassoon and Company, Ltd., Shanghai, on certain specific questions which he formulated. These declarations were duly made, the chief accountant of the Shanghai branch declaring that his company made a payment on Nov. 17, 1926, to the Hong Kong company of the eleven crores of rupees and that the Shanghai branch made a tael loan of six and a half crores to the Bombay company but did not borrow any portion of that loan from the Hong Kong company, and that the Shanghai branch had not since Nov. 17, 1926, borrowed any taels from the Hong Kong company or paid to that company any interest which they themselves had received from India. There was a further declaration from a Mr. Priestley, director of the Hong Kong company stating that the Bombay company on Nov. 17, 1926, paid off the loans and that the Hong Kong company had made no new loan of six and a half crores of taels to the Bombay company or to Messrs. E. D. Sassoon and Company, Ltd., and that there were no transactions between the Bombay company and the Hong Kong company in 1927. This declaration was accompanied by the certificate of a firm of chartered accountants, auditors to the Hong Kong company. At a later stage, namely, in June, 1931, a letter from Sir Victor Sassoon was put in to the effect that in 1926 when he was in China he set to work to make arrangements on behalf of the Bombay company so that after his return to India that company was in a position to send the telegram of Oct. 27, 1926.

When the commissioner, in compliance with the High Court's order came to state in his letter of reference the evidence which existed in support of the conclusion that in 1927 the Hong Kong company had been in receipt of interest from the Bombay company he set forth the correspondence already referred to as taking place in Oct. and Nov., 1926, and the facts as to the notifications made by the income-tax officer in October and November showing that he proposed to charge the Bombay company with tax as agents for the Hong Kong company. He set forth also that the amount of the original loan was very large, over eleven crores of rupees, and that the Hong Kong company, the Bombay company and the Sassoon company at Bombay and Shanghai were all closely associated concerns, their share capitals being held almost exclusively by members of the same family. Also that the Hong Kong company was "practically formed to finance the Bombay company," the former having a paid up capital of eight crores and the latter of one crore; while both had large resources in addition thereto from their banking or financing businesses.

Their Lordships are well satisfied that all these companies were closely associated, that in the words of sects. 42 and 43 there was a business connection between them and that they were working in this matter in concert as though under one control. Indeed, it is now clear that so long as the Hong Kong company was lending money at interest to the Bombay company the former company was in receipt of profits or gains taxable under sects. 42 (1) and 43. This matter was thrashed out by litigation in respect of the transactions which took place in 1924-1925 and the liability under these sections was confirmed by a judgment of this Board in *Commissioner of Income-tax, Bombay Presidency v. Bombay Trust Corporation, Ltd.* (1929) 57 I.A. 49. Tax was paid without contest in respect of the transactions of 1926. The question is whether there was any evidence upon which the income-tax authorities could in law find that in 1927 the Hong Kong company was receiving from the Bombay company any sums as interest on money lent.

In their Lordships' opinion the High Court at Bombay have rightly answered in the negative the question referred to them. However sceptical the attitude which the income-tax authorities may think fit to adopt towards the declarations offered and the entries made in the Bombay company's books, it is necessary, if the assessment made is to be supported, that there shall be some evidence to show that in 1927 the loan from the Hong Kong company continued and that interest "accrued or arose" to that company thereon. If the entries in the books show no payment to the Hong Kong company and nothing due to the Hong Kong company, the income-tax authorities cannot without evidence insist upon a right to treat entries showing a tael loan of six

and a half crores made by a Shanghai company, and interest calculated in taels paid thereon, as evidence that a somewhat similar amount was due from and was being paid by the Bombay company to the Hong Kong company. The only rule of evidence to be discovered in the Indian Evidence Act having any bearing upon this question would appear to be illustration (d) to sect. 114 of the Indian Evidence Act :

The court may presume that a thing or state of things which has been shown to be in existence within a period shorter than that within which such things or states of things usually cease to exist is still in existence.

This rule cannot in the present case supply the want of evidence. Their Lordships are not considering a case in which by reason of the entries in an assessee's books of account being inconsistent, or by reason of positive evidence showing that certain entries in his books are erroneous or fraudulent, the value of the books as evidence can be considered as overthrown. On the contrary, though the income-tax authorities have been somewhat slow to appreciate it, the circumstance that in Oct. or Nov., 1926, it was disclosed that the transactions between the Hong Kong and Bombay companies were to be charged with Indian income-tax means that the persons interested and in control of these closely associated companies had the strongest reasons for desiring to change their course of business (not merely for pretending to change it) so as not in the future to attract the tax. The Hong Kong company from a taxpayer's point of view had two plain disqualifications as a lender ; it had a business connection in India and it had a large capital of its own upon which it did not need to pay interest. It is altogether credible therefore that the persons in ultimate control of all the associated companies, should desire to pay off the Hong Kong company and to obtain another financier for the Bombay company. By entries regularly made in its books, and by other evidence the Bombay company says that this is what it did. What is the evidence to the contrary—evidence, that is to say, to show that throughout 1927 payments were being made to the Hong Kong company, that what purported to be the making of a tael loan was a fiction, and that entries of payments of interest upon a tael loan were in reality references to payments of interest to the Hong Kong company ? Their Lordships agree with the Bombay High Court in thinking that such evidence is altogether lacking. The income-tax authorities in arriving at the contrary opinion have insufficiently considered that the question at issue has to be decided according to the legal rights resulting to the parties from what they in fact did and agreed to. If the Hong Kong company really accepted a credit in the books of the Sassoon company at Shanghai in discharge of their loans to the Bombay company, and if the latter really intended to become liable to Sassoons at Shanghai for a debt in taels then the Bombay company succeeded in changing its financier. The only evidence in the case is evidence to

that effect, and a mere refusal to believe in the evidence to that effect is not, in the absence of any positive evidence, sufficient to entitle the income-tax authorities to hold that in 1927 the Hong Kong company was in receipt of profits and gains from the Bombay company.

Comment has been made by different income-tax officials that the Bombay company has not produced the books of the Hong Kong Trust Corporation which are at Hong Kong. Also, and less unreasonably, that the Bombay company was at first unwilling to disclose the name of the firm from which the Sassoon company at Shanghai obtained the finance which enabled them to make the tael loan to the Bombay company. At a later stage of the proceedings the Bombay company, the assessee, stated that Sassoons of Shanghai obtained this finance from a company called Arnold and Company in China. It is said also that Arnold and Company is closely associated with the Sassoon companies. If on these lines it could be shown—not that Arnold and Company lent the money and became entitled as upon a real transaction with Sassoons of Shanghai to the rights of a lender—but that the tael loan made by Sassoons was in fact and in law made by the Hong Kong company, no doubt there would be something upon which the assessment order could be supported. But the case stated discloses no evidence to show the falsity of any of the entries in the books or the unreality of the correspondence of Oct. and Nov., 1926, supported as these are by the declarations for which the assistant commissioner had asked. The comments above noted do not supply the place of such evidence. The Bombay company made the repayment in the same manner as it had received payment, namely, by the agency of the common banker. On no view is it possible to suppose that the transactions of 1927 were the same in character as the transactions of the previous years. If it is to be held that very different transactions are in substance the same in character, the basis of such a finding must be evidence. The appeal from the judgment of the High Court dated Aug. 29, 1933, fails.

Solicitors : *The Solicitor, India Office* (for the appellants) ; *Linklaters & Paines* (for the respondents).

[*Reported by T. A. DILLON, ESQ., Barrister-at-Law.*]

**GAUMONT-BRITISH PICTURE CORPORATION, LTD.
v. ALEXANDER.**

[KING'S BENCH DIVISION (Porter, J.), July 22, 23, 1936.]

Master and Servant—Contract of service—"Want of mutuality"—Stipulations in favour of one party—Restrictions during service—Public policy—Suspension of salary—Penalty.

The court does not inquire into the adequacy of the consideration for a contract and where a party leaves the determination of all matters under a contract in the discretion of the other party that does not in all circumstances constitute a total want of consideration.

Restrictions placed upon an employee under a contract of service to take effect during the contract are not in general against public policy.

A clause in an artiste's agreement suspending salary upon her failure to appear and perform does not prevent the employers recovering damages for breach of contract as well as suspending her salary. The suspension of salary is not a penalty.

[EDITORIAL NOTE.] Where the employers are themselves providing material and engaging other employees at considerable expense to themselves it is quite natural that they should wish to bind an indispensable employee to the utmost, because his failure to carry out his engagement will in most instances lead to heavy loss. This is evidently the case in the engagement of a star artiste for a theatrical or film production, and the stern conditions of the contract here litigated are held to be within the legal powers of the corporation engaging the artiste. At the same time there is a point where a contract becomes so one-sided that it is unenforceable, though it is probable that this is seldom the case where a substantial salary is to be paid.

FOR THE LAW ON THESE POINTS, see HALSBURY, Hailsham Edn., Vol. 7, pp. 139, 140, para. 199, and 1st Edn., Vol. 20, Master and Servant, pp. 88-90, para. 167; and FOR CASES, see DIGEST, Vol. 12, pp. 204-206, Nos. 1640-1658, and Vol. 43, pp. 19, 20, Nos. 120-134.]

Cases referred to:

- (1) *Young v. Timmins* (1831), 1 Cr. & J. 331; 43 Digest 27, 186.
- (2) *Hepworth Manufacturing Co. v. Ryott*, [1920] 1 Ch. 1; 43 Digest 57, 589.
- (3) *Sykes v. Dixon* (1839), 9 Ad. & El. 693; 34 Digest 170, 1326.
- (4) *Pilkington v. Scott* (1846), 15 M. & W. 657; 34 Digest 169, 1324.
- (5) *Hartley v. Cummings* (1847), 5 C.B. 247; 34 Digest 50, 247.
- (6) *Mortimer v. Beckett*, [1920] 1 Ch. 571; 12 Digest 626, 5153.
- (7) *Milsted (W. H.) & Son, Ltd. v. Hamp & Ross & Glendinning, Ltd.*, [1927] W.N. 233; Digest Supp.
- (8) *Dowden & Pook, Ltd. v. Pook*, [1904] 1 K.B. 45; 43 Digest 31, 247.
- (9) *McEllistrim v. Ballymacelligott Co-operative Agricultural & Dairy Society*, [1919] A.C. 548; 43 Digest 35, 309.
- (10) *Wessex Dairies, Ltd. v. Smith*, [1935] 2 K.B. 80; Digest Supp.
- (11) *Hillas & Co., Ltd. v. Arcos, Ltd.* (1932), 38 Com. Cas. 23; Digest Supp.
- (12) *Freeth v. Burr* (1874), L.R. 9 C.P. 208; 12 Digest 340, 2838.

SPECIAL CASE: Award by arbitrator stated in the form of a special case.

A contract of employment of an actress contained an arbitration clause, and certain disputes between the parties were thereunder referred to

arbitration. The arbitrator stated his award in the form of a special case raising four questions: (a) whether the contract was void for want of mutuality; (b) whether it was against public policy as being in unreasonable restraint of trade; (c) whether it had in fact been repudiated (this report does not deal with this point); (d) whether the provision entitling the employers to withhold the artiste's salary in the case of a breach by the artiste amounted to a penalty or forfeiture.

The contract contained the following clauses:

Clause 1 was a definition clause.

Clause 2 provided for exclusive service for one year from April 2, 1934, and such further period as might be added. The artiste was to perform such services as the corporation or its sub-lessees should require, and without prejudice to the generality of the foregoing the artiste was to act as an actress or vocalist in sound or silent films; to act as actress or vocalist in stage and musical plays, revues, variety, cabaret or other public or private performances including broadcasting by wireless or television; to perform and take part in gramophone recording; to write or assist in writing articles for the press dealing with the foregoing productions or performances, to render advice and assistance to the publicity department.

Clause 3 gave the corporation the unfettered right to exercise their rights under the agreement by themselves or their sub-lessees and the right to sub-let her services and retain any salary paid for its own use and benefit, the salary under clause 4 of the agreement being paid.

Clause 4 provided for salary subject to the due performance on the artiste's part of the stipulations of the agreement to the satisfaction of the corporation. The said salary was to be for the exclusive services of the artiste who under no circumstances whatever shall be entitled to be paid any remuneration in addition thereto.

Clause 5 provided as follows:

The artiste agrees with the corporation that she will act or play such leading part or parts in such of the said films or such of the said performances as may be assigned to her by the corporation or any of its sub-lessees. The artiste shall if so required take a part or parts in one or more of the said films and/or in one or more of the said performances at the same time provided always that the corporation may at any time or times and for any period or periods omit the artiste from the part assigned to the artiste in any of the said films and/or the said performances and/or substitute another artiste in the artiste's place and/or require the artiste to take any other leading part or parts in the said films and/or the said performances and the corporation is not to be under any obligation to assign to the artiste any part or specified or particular part in any of the said films or performances. The artiste shall properly and faithfully comply with all reasonable directions, rules and regulations made by the corporation or any of its sub-lessees in connection with the production of any of the said films or performances and will perform and render such services to the full extent of her ability and in the manner in which she is directed so to do.

The artiste then undertook to abide by the non-smoking regulation.

In clause 6 the artiste undertook to work where and when required for the purposes of performances, recording tests, conferences, fitting of clothes, rehearsals, and taking of still photographs. She undertook to work at night, on Sundays and bank holidays.

By clause 7 the artiste was to be paid reasonable travelling and hotel expenses, but such expenses were to be approved by the corporation, whose decision was to be final.

Clause 8 provided as follows :

It is expressly agreed that the engagement is an exclusive engagement by the corporation of the entire services of the artiste for the period mentioned in clause 2 and accordingly the artiste agrees with the corporation that from the date hereof until the expiration of her said engagement the artiste shall not without receiving the previous written consent of the corporation do any work or perform or render any services whatsoever to any person firm or company other than the corporation and its sub-lessees Without limiting the foregoing the artiste in particular agrees with the corporation that she will not during the period of her said engagement act sing or pose or in any manner be concerned with or engaged in the production of cinematograph films or in any form of public or private entertainment or in the making of gramophone or other sound records or in broadcasting by wireless or television or in the writing of articles on any subject whatever for publication other than for the corporation and its sub-lessees.

Then followed a strict provision preventing the artiste after the expiration of the agreement repeating anything that formed part of or had been introduced into the artiste's work.

By clause 9 the artiste authorised the use for publicity purposes of any photograph or film taken by the corporation or its sub-lessees.

In clause 10 the artiste undertook not to make directly or indirectly any statement for publicity purposes other than under the direction of the publicity department of the corporation.

Clause 11 limited the liability of the corporation in the supply of dresses to fancy and special costumes, and obliged the artiste to supply modern clothing and to be responsible for the safety of her own property.

By clause 12 the artiste was to keep her weight at or below a stated figure, and to maintain herself in a state of health which would enable the corporation to effect a normal insurance and to submit to medical examination. If her weight exceeded another stated figure, or she failed in respect of the insurance or to present herself for medical examination, the agreement might be terminated and the salary was immediately to cease.

Clause 13 provided for suspension or determination upon (a) the artiste failing to fulfil the provisions and conditions of the agreement ; (b) the corporation or its sub-lessees being unable or unwilling to continue its work for any cause beyond its or their control ; (c) illness or incapacity of the artiste ; (d) the artiste's voice becoming unsatisfactory

in quality or tone ; (e) the artiste in her private life committing any act whereby she should become disgraced or held in contempt, or which might prejudice the public against her. Any such suspension or determination to be without prejudice to claims of either party of any breach or non-performance of the agreement.

Clause 14 provided as follows :

In the event of the artiste's engagement being suspended by virtue of clause 13 the artiste shall not be entitled to any remuneration for or during the period of the suspension of her engagement, but the corporation shall at its option be entitled to continue the period of engagement for such further period as may be necessitated owing to any of the causes above mentioned and in that event this agreement and the remuneration for the period of suspension shall be continued for a period equal to the period of suspension.

In the event of the engagement being determined the salary was immediately to cease to be payable.

Clause 15 provided that if the corporation should be unable to complete the production or employ the artiste in the said films, etc., the salary should cease to be payable and there should be no liability on the part of the corporation for any loss, damage or inconvenience.

Clause 16 provided for the non-liability of the corporation for death of or injury to the artiste from any hazardous act in the performances, but the corporation were at the request of the artiste to provide a double.

Clause 17 provided for suspension of salary during illness, lock-outs, royal demise, national calamity, etc. By Clause 18 the artiste was to extend the engagement to finish any work begun during the engagement. Clause 19 dealt with films in a foreign language and by clause 20 the corporation agreed to give the usual screen credit and other publicity. The artiste then guaranteed her nationality and there followed an option to the corporation to renew the contract for a further year. The usual arbitration and notice clause completed the contract.

During the second year of the engagement under this contract Miss Frances Victory Alexander, who was known professionally as Miss Frances Day, took exception to the part she was asked to perform. The corporation at once alleged that she had refused to perform her part of the agreement and stopped payment thereunder. After some negotiation the matter was taken to arbitration. The arbitrator found for the corporation and awarded £1,530 damages subject to the opinion of the court upon the questions previously stated.

F. R. Evershed, K.C., and *T. Carthew, K.C.*, for the respondent in the arbitration, who was the appellant on the case stated : The contract was so unfair that under its terms the respondent was reduced to a position of slavery. The corporation were able in their discretion to abstain from giving her any work at all. At the same time, though she received no salary, she would remain bound. It would be contrary to public

policy to enforce it. The clauses under which it was possible to suspend payment of her salary were indistinguishable from a penalty and damages could not be claimed in addition.

[Counsel referred to *Young v. Timmins* (1), *Hepworth Manufacturing Co. v. Ryott* (2), *Sykes v. Dixon* (3), *Pilkington v. Scott* (4), *Hartley v. Cummings* (5), *Mortimer v. Beckett* (6), *Milsted & Son, Ltd. v. Hamp & Ross & Glendinning, Ltd.* (7), *Dowden & Pook, Ltd. v. Pook* (8), *McEllistrim v. Ballymacelligott Co-operative Agricultural & Dairy Society* (9).]

F. van den Berg, K.C., and *B. B. Stenham* for the corporation: The arbitrator has held that the contract was not unreasonable in all the circumstances, nor was it objectionable upon grounds of public policy. Want of mutuality and being against public policy are two separate questions. The first really amounts to a total failure of consideration. If it is necessary to weigh the consideration, the respondent has had ample consideration. The restrictions which are contrary to public policy are those arising after the contract. Here the restrictions objected to arise during the performance of the contract. The mere suspension of salary is not a penalty, and there is no authority to support that contention.

[Counsel referred to *Wessex Dairies, Ltd. v. Smith* (10), *Hillas & Co., Ltd. v. Arcos, Ltd.* (11), *Freeth v. Burr* (12).]

PORTER, J.: I am asked to find first of all that a certain contract which was dated Dec. 27, 1933, and which was made between the claimants, the Gaumont-British Picture Corpn., Ltd., of the one part and Miss Frances Day, the well-known artiste, of the other part, is void, and that it is void for one of two reasons: First of all because of want of mutuality, and, secondly, because it contains matters in restraint of trade which makes it contrary to public policy that it should be enforced. Those are taken as two separate arguments, and although they may have some interaction one upon the other, I am obliged to find, and I propose to find, my award upon each of them separately.

I am not, myself, very familiar in this connection with the phrase "want of mutuality"; I am very familiar with it in the other connection, in which it is said that parties have not entered into contract where they have not agreed all the terms one with the other. Here, as I understand the phrase "want of mutuality," in the present position of the cases, it means that there has been no consideration, or no real consideration, for the contract which has been entered into. There appears to have been a time when it was thought that the court would have a kind of commission to go into the question of whether adequate consideration had been given for a contract. I think that appears if one deals with the earliest case which was quoted by Mr. Evershed, the case of *Young v. Timmins* (1); but that is not now, and it is admitted not to be now,

the law ; and the question really is : Was there any consideration, on that part of the case, it being left to the parties to make their own bargain as they pleased, one with the other ? It is a part of the individual right which the law has been concerned to develop that that outlook should be preserved in the law of England. It has not always been preserved ; one gets certain matters like the Truck Acts, and so on, where certain provisions are not possible, and if you make such a bargain it will be struck out. But this is not one of those cases, and therefore I am left in this case with the question : Is there any consideration on the part of the Gaumont-British Picture Corp'n, Ltd., or is it merely illusory ?

I have had an elaborate and interesting argument as to whether the contract should be so regarded, but I cannot say that I find myself capable of so regarding it. I do not think I want to go further than this as far as I am concerned, that there was a promise that at any rate the respondent should have the opportunity of earning £6,750 a year. She takes her risk, it is quite true, of a good many things which may prevent her from earning that sum, or from earning the whole of that sum, but I do not myself view the fact that she takes some risk as one which makes it a contract for which there is no consideration. People do from time to time enter into contracts in which they take certain risks, and one example is the class of contract where it is left absolutely to the determination of an architect as to whether the contract has been properly fulfilled. It is true that he has to be honest, and so on, as in this contract, but it has never yet been held that there is no consideration for such a contract because in his absolute discretion, whether reasonable discretion or not, he is left to decide whether such a sum is or is not due. People take the risk, and they get a corresponding advantage, and that seems to me to be the consideration.

Then there were various other matters which were referred to as showing that really this contract meant nothing to the respondent in the case. It is quite true that there are certain disadvantageous terms imposed upon the respondent in this contract, terms which, if this contract were to be insisted upon in its strictest sense, might prove very disadvantageous to her, but of that I think she takes her risk. As a matter of common sense, they are not likely to arise, and if, knowing, as she must know, that the Gaumont-British Picture Corp'n. are a body who carry out their business for the purpose of making films for exhibiting and releasing them, and for the purpose of making money out of films and theatres—if, as I say, knowing that, she chooses to enter into a contract in the form which she did, I cannot say that there is any want of mutuality, or that there is no consideration, and I hold that there was consideration.

Now, with regard to the other question, that gives rise to a good deal more difficulty. That is the question of whether it is contrary to public

policy. I think a contract would be thought to be contrary to public policy if there were a restraint, such as a restraint of trade, which would be unjustifiable for the business of the claimants in the case ; but I do not myself know of any case, although it is possible that there may be a case, where circumstances might arise in which it would be held that a restraint during the progress of the contract itself was an undue restraint—although that is possible, it is not necessary for me to decide it here, and I myself know of no such case, and I do not propose to decide one way or another if it is possible until it becomes necessary, when the matter is directly brought before me. All I can say is that with regard to this case I do not find anything in it which would lead me to say that during the period of the service there is such a restraint as is contrary to public policy. Indeed, for the most part, those who contract with persons and enter into contracts which one may for this purpose describe as contracts of service, have generally imposed upon them the position that they should occupy themselves solely in the business of those whom they serve ; and in this matter, in a matter where I should have myself said that it must be largely a question of evidence how far the protection of clauses of that kind would extend, at any rate during the existence of the contract of service ; in cases of this kind, where I should have thought that evidence was essential to the knowledge of the tribunal as to what protection was required, I should not myself lightly upset the decision of the learned arbitrator when he holds that at any rate in that respect the contract was both reasonable and not contrary to public policy in the sense that it was to the disadvantage of the community.

Then, secondly, there are one or two matters which deal with the future, and they are contained in clauses 8, 9 and 10. I have had most doubt with regard to clause 8, and I have had much doubt with regard to that because it seems to tie up the artiste for ever from reproducing songs or dialogue and speech which have formed part of the artiste's work in the matters in which she has performed when she was under this contract of service. I think, myself, that it would be possible to strike out the whole of that clause. I think it is a separate clause from the rest of clause 8, but again I find difficulty, not being the learned arbitrator, and not being sufficiently acquainted with the evidence which was given in the matter, in saying that he could not find as a question of fact that it was neither contrary to public policy nor unreasonable for the protection of the Gaumont-British Picture Corpn. So far as clauses 9 and 10 are concerned, I do not myself regard a clause which merely allows the use of the portrait, picture, photograph or film by the claimants, if you please for ever, as being a restraint of trade as against the respondent. It seems to me to be no more a restraint of trade than if she were to sell to somebody the whole or a part of her literary output, or her artistic output if she were an artiste, or anything of that kind ;

it does not seem to me that it prevents her from carrying on her trade, although it may enable them to have the use of her photograph or film on a future occasion.

Finally, I should not myself construe clause 10 as doing more than applying to the period of the service. Normally, in reading the clause, which is a clause in an agreement of service, I should take the restraint contained in it as applying to the time of service, and not to any future time. That general view might readily be modified if I found something in the contract itself which would lead to the modification of that view, but I do not find it necessarily modified, because, although there are certain indications which might lead me to modify it, on the other hand I find other indications, such as the indication where there is a specific provision, I think in clause 8, "at any time after the date of this agreement," and clauses of that kind, where specific references are made to what is to happen after the agreement is over; and having regard to those, I do not find that there is anything here to lead me to the view that clause 10 must be applied to anything other than what I should normally apply it to, namely, the period during which the contract was in force.

I am asked to say that the lady should not pay damages in addition to foregoing her salary. I am bound to say that I have a little sympathy with her position, but I have to determine the matter legally, and it seems to me that I should be extending the law if I were to hold that in law the claimants were not entitled to withhold the salary and also to claim damages. After all, the word "penalty," both in the cases quoted and in general use in the legal profession, as a rule means "I promise to pay so much money if I break certain terms of the contract." It is quite true that if you so determine the contract, if recovery is made of the penalty as a penalty and not as liquidated damages, that is conclusive of the matter. That is a promise to pay a certain sum of money.

Now here, as I see the matter, the lady failed to give her services to the shooting of the film. That means that the claimants were deprived of her services during that period, and, being deprived of her services during that period, they were not obliged to pay her for services which she failed to render. Then so far as damages are concerned, in addition to that they suffered damage. Let me take the kind of damage which has been suggested as one of the matters which have to be considered. I do not know whether these are the facts, but this is the kind of way in which damage may arise: They bring on to the scene a number of other artistes; they have got to pay them, and pay them only if they bring them on the scene, and it is obvious that in addition to the loss of her salary it is causing considerable damage and monetary expense to the Gaumont-British Corpn. in making preparations for, employing artistes for, and incurring expense in order to prepare for, the shooting of the

film on that day. It being possible that there is such damage over and above the loss of salary, I am not sitting here merely discussing the question as to whether an arbitration award should be enforced or not. I am not in a position to say whether those damages which have been determined by the arbitrator are right or not ; I am bound to accept them as they stand. What I have to see is whether necessarily the claimants cannot both recover damages and refuse to pay salary, which is what they claim to do, and in my view, in law, they are entitled both to refuse to pay salary and to claim damages.

Now that concludes the matter, really, but let me say this, that so far as the question of construction of the document is concerned I find myself obliged to construe it as I think people carrying on the business of preparing films and acting in films would construe it. I must give it a common sense construction. In some ways I find that common sense construction more exact than a construction which would be possibly more in accordance with some legal outlooks ; and I say that for this reason, that when you get questions like the questions on clause 17, which was quoted to me—

In the event of the corporation being unable to commence or continue its work in the said films or the said performances or the said recordings or closing its studios or theatres by reason of or on account of illness or default of the artiste—

and so on, it was pressed upon me that I ought to read it with supreme literalness. I think I have read it with supreme literalness, but I do not think one can say off-hand that the words bear a meaning which it is easy to construe, or that one could place too much reliance upon their containing obviously unjust provisions, if “unjust” be the right word. I can see a great deal which might be said with regard to “being unable” for instance, “in the event of the corporation being unable to commence or continue its work . . . by reason of or on account of illness”—that may be more simple—“or of any strike lock-out war civil disturbance.” They follow one upon the other, and it may be a matter for a great deal of evidence and a great deal of legal dispute. I only say that for those reasons I must not be thought to be merely giving a loose construction, in my view, to this contract. In some ways I think I am giving an extremely strict construction to it, and perhaps in all ways, but I think that in construing it I am bound to give business efficacy to its provisions, and I have endeavoured to do so.

Solicitors : *M. A. Jacobs & Sons* (for the claimants) ; *Burton & Ramsden* (for the respondent).

[*Reported by C. ST. J. NICHOLSON, Esq., Barrister-at-Law.*]

BROWNE v. MOODY AND OTHERS.

[PRIVY COUNCIL (Lord Atkin, Lord Russell of Killowen, Lord Macmillan, Lord Alness, Sir Michael Myers), **July 9, 27, 1936.**]

Will—Construction—Vesting—Gift contained only in direction to divide—Postponement of gift to let in life interest—Substitution clause.

Testatrix, by cl. 5 of her will, set aside a fund of \$100,000, and gave the income therefrom to her son for his life, and on his death she directed the fund to be divided as follows : one half to her grand-daughter Enid, and the other half equally between her daughters Florence, Constance and Helen. By cl. 6 she gave, devised and bequeathed the residue of the estate equally between the said grand-daughter and her three daughters share and share alike. By cl. 7 she directed that, if the grand-daughter or any of the daughters predeceased her or her son leaving issue, the child or children of the person so dying should take the share to which their mother would have been entitled had she survived. All the beneficiaries mentioned survived the testatrix. A special case was stated for the opinion of the Supreme Court of Canada, asking two questions : (a) whether the legacies given by cl. 5 on the death of the son vested in the beneficiaries on the death of the testatrix ; (b) if they became so vested whether they were liable to be divested under cl. 7. The Supreme Court answered the first question in the negative, and the second question did not arise. On appeal to the Privy Council :—

HELD : (i) the legacies given by cl. 5 on the death of the son vested in the beneficiaries on the death of the testatrix since the postponement of the division was solely for the purpose of interposing a life interest in favour of the son.

(ii) in the case of a beneficiary dying in the lifetime of the son without issue the legacies would not be divested.

(iii) in the case of a beneficiary dying in the lifetime of the son leaving issue, the legacies would be divested in favour of the child or children of the beneficiary so dying.

Re Browne, [1934] S.C.R. 324 reversed.

[EDITORIAL NOTE.] The Ontario courts in this case felt themselves bound by the decision in the *Busch* case (3), and the decisions which had followed it, to decide against these gifts being vested interests. The Supreme Court, which upheld the decision in the lower court, in the reasons for judgment given by RINFRET, J., found in the fact that the language used in cl. 5 was different from that of the remainder of the will, and in the wording of cl. 7 which spoke of the interest "the mother would have had," an indication of intention against vesting at the death of the testatrix. Their Lordships, however, reversed this decision, finding the case within the principle of construction well recognized in English cases. This principle is that where the postponement of division is merely for the purpose of letting in a life interest, such postponement does not indicate any intention that the interests shall be contingent in any way.

FOR THE PRINCIPLE APPLIED, see HALSBURY, 1st Edn., Vol. 28, Wills, pp. 813, 814, para. 1465 ; and FOR CASES, see DIGEST, Vol. 44, pp. 1064-1068, Nos. 9178-9210.]

Cases referred to :

- (1) *Re Gilmour* (1932), 41 O.W.N. 34.
- (2) *Re Gaukel* (1932), 41 O.W.N. 215, 365.
- (3) *Busch v. Eastern Trust Co.*, [1928] S.C.R. 479 ; Digest Supp.
- (4) *Packham v. Gregory* (1845), 4 Hare 396 ; 44 Digest 1077, 9294.

- (5) *Re McFarlane*, [1934] O.R. 383 ; Digest Supp.
- (6) *Re Bennett's Trust* (1857), 3 K. & J. 280 ; 44 Digest 1067, 9205.
- (7) *Leeming v. Sherratt* (1842), 2 Hare, 14 ; 44 Digest 1137, 9339.
- (8) *Singer v. Singer*, [1932] S.C.R. 44 ; Digest Supp.
- (9) *Re Duke, Hannah v. Duke* (1880), 16 Ch. D. 112 ; 44 Digest 1109, 9592.
- (10) *Ward v. Brown*, [1916] 2 A.C. 121 ; 44 Digest 1082, 9333.

APPEAL by Enid Browne from a judgment of the Supreme Court of Canada (SIR LYMAN POORE DUFF, C.J., and RINFRET, SMITH, CANNON, AND HUGHES, J.J.), dated Mar. 6, 1934, affirming a judgment of ROSE, C.J., of the High Court of Justice for Ontario dated Mar. 25, 1933.

The facts of the case, relevant to the appeal, appear in the judgment of their Lordships delivered by LORD MACMILLAN.

Cyril Radcliffe, K.C., and *A. J. Russell Snow, K.C.*, for the appellant, referred to : *Busch v. Eastern Trust Co.* (3), *Re McFarlane* (5), *Packham v. Gregory* (4), *Re Duke, Hannah v. Duke* (9).

The Attorney-General for Ontario (Hon. A. W. Roebuck, K.C.) and *G. P. Slade* for the Official Guardian, referred to *Busch v. Eastern Trust Co.* (3), *Re McFarlane* (5), *Re Gilman* (1), *Re Gaukel* (2), *Ward v. Brown* (10).

G. A. Urquhart, K.C., for the executors.

LORD MACMILLAN : In this appeal their Lordships have to determine the interpretation and effect of certain provisions in the will of the late Mrs. Katherine Hamilton Browne of Toronto.

The testatrix died on Mar. 17, 1930. She was survived by a son, William George Hamilton Browne, and three daughters, Mrs. Florence Moody, Mrs. Constance Kinnear and Mrs. Helen Smith ; she was also survived by a grand-daughter, Enid Browne, the daughter of her son, William George Hamilton Browne. By her will, which was dated Dec. 16, 1929, the testatrix appointed executors and after certain specific bequests in favour of her son she gave directions with regard to a sum of \$100,000 in the following terms, which it is necessary to quote textually, as the arguments in the appeal turned largely upon the precise language employed :

Whereas I have now the sum of \$100,000.00 invested in the name of E. H. Watt, of the said firm of Watt & Watt, in trust in the form of a call loan, I hereby direct that the said fund is to be continued to be invested in call loans by the said E. H. Watt during the lifetime of my said son William George Hamilton Browne, and the income arising therefrom is to be paid to my said son during his lifetime. In the event of the death of the said E. H. Watt during the lifetime of my said son I direct that the fund now invested by him in the form of a call loan shall be invested by my executors in such securities as are authorized by the laws of the province of Ontario as trustee investments and the income therefrom is to be paid to my said son during his lifetime. On the death of my said son William George Hamilton Browne I direct that the said fund of \$100,000.00 is to be divided as follows : One half of the said fund to my grand-daughter Enid Browne, daughter of my son William George Hamilton Browne, and the remainder of the said fund to be divided equally

between my daughters Florence Yoda Moody, wife of Robert E. Moody, now of Los Angeles, California; Constance Emma Kinnear, wife of Harold Kinnear, of the City of Detroit in the state of Michigan, and Helen Smith, wife of Herbert P. Smith, of Jamaica, Long Island, New York, share and share alike.

By the sixth clause of her will the testatrix gave devised and bequeathed all the rest and residue of her estate, both real and personal, to her grand-daughter Enid and her three daughters, Florence, Constance and Helen, to be divided amongst them equally, share and share alike. The seventh clause, the only other clause which need be considered, reads as follows :

7. In the event of my grand-daughter Enid Browne or any of my said daughters predeceasing me or predeceasing my said son leaving issue I direct that the child or children of the person so dying shall take the interest to which their mother would have been entitled had she survived.

It will be observed that all the beneficiaries mentioned in the fifth, sixth and seventh clauses of the will survived the testatrix. They are all still alive. Each of the three daughters is married and has issue. The items specifically bequeathed by the testatrix to her son and the fund of \$100,000.00, as to which she gave the directions above quoted, constituted the bulk of her estate and their Lordships were informed that the residue is negligible in amount.

In 1932 by originating motion in the High Court Division of the Supreme Court of Ontario at the instance of the son of the testatrix, who was one of her executors as well as a legatee under her will, the question was raised whether the grand-daughter and daughters of the testatrix had vested interests in the \$100,000.00 fund. At the initiation of the proceedings the grand-daughter Enid was an infant and she, as well as the infant children of the daughters, Florence and Constance, and the unborn children of all three daughters, were represented by the official guardian, for whom the Attorney-General of Ontario appeared at their Lordships' bar. In the course of the proceedings the grand-daughter Enid came of age and she is now the appellant in the appeal, the respondents being the three daughters, the official guardian, the executors of the will, and the daughter (who is of age) of Mrs. Helen Smith. There being a question as to whether all parties were represented before their Lordships it was intimated that counsel had now received complete instructions and that the necessary formal steps would be taken to enter appearance for the parties not previously represented in the appeal.

The learned CHIEF JUSTICE OF ONTARIO found himself unable "to distinguish the gift to the grand-daughter and the daughters from the gifts in *Re Gilmour* (1) and *Re Gaukel* (2), which were held to be covered by the rule stated in *Busch v. Eastern Trust Co.* (3). Regarding himself as bound to follow these judgments the learned CHIEF JUSTICE held that no vested interest in the fund in question was

acquired by the grand-daughter and daughters at the death of the testatrix. The *Busch* case (3) having been previously followed by the Court of Appeal for Ontario in several cases involving the same question (including the case of *Re Gaukel* (2), which was affirmed by the Court of Appeal) leave was applied for and granted to appeal against the judgment of the learned CHIEF JUSTICE *per saltum* direct to the Supreme Court of Canada. A special case was subsequently adjusted and presented to the Supreme Court in which the following questions were submitted :

(a) Whether or not the legacies directed by the said testatrix, Katherine Hamilton Browne, deceased, under cl. 5 of her said will to be paid to Enid Browne, Florence Yoda Moody, Constance Emma Kinnear and Helen Smith (the appellants herein) upon the death of the life tenant, William George Hamilton Browne, became vested upon the death of the said testatrix ?

(b) And should this honourable court find that such legacies did become vested upon the death of the testatrix, then, whether or not the legacy of any of such appellants is liable to be divested under or otherwise affected by para. 7 of the said will ?

The Supreme Court answered question (a) in the negative and question (b) accordingly did not arise.

The reasons for this judgment were delivered by RINFRET, J., and were concurred in by the learned CHIEF JUSTICE OF CANADA and SMITH, CANNON and HUGHES, JJ. From these it appears that the grounds of the decision were, first, that there are in cl. 5 no words of present gift to the grand-daughter and daughters but only a direction to divide the fund among them on the occurrence of the son's death. "According to the words she uses, grammatically and literally, the testatrix gives when she divides." Second, that "the fund is really treated as separate and distinct from the estate disposed of in the will" and "there is nothing in cl. 5 necessarily indicating that except in the event mentioned [Mr. Watt's death] the executors are to have anything whatever to do with the fund. In terms it is not given to them either in trust or otherwise." Third, that the language used by the testatrix in cl. 5 differs from that which she uses in "every other clause of the will where the testatrix makes a bequest with the evident intention that it should become vested at once. Invariably and in each case without exception the testatrix says, 'I give, devise and bequeath'." The contrast "evidences a desire to postpone the operation of the gift to the appellants until the period of distribution." Finally, that the words in cl. 7, "the interest to which their mother would have been entitled had she survived," read fairly and literally, mean that "the mother (i.e., any of the appellants) takes no title to that interest unless she survives both the testatrix and her son, and that is to say, till the time of distribution." The learned judge further stated that the *Busch* case (3) ought not to be cited as deciding more than was there actually decided and that there was no intention in that case of laying down a rule of general application. The

argument which their Lordships heard from the Attorney-General in support of the judgment followed the same lines.

Their Lordships do not find themselves in agreement with the decision of the Supreme Court. They fully recognise, with RINFRET, J., that the golden rule in interpreting wills is to give effect to the testator's intention as ascertained from the language which he has used, but in the present instance they do not find manifested in the language of the testatrix the intention which the Supreme Court have distilled from it. The testatrix has made her testamentary dispositions in terms of very ordinary occurrence from which the courts in a long series of cases have drawn a contrary inference as to intention.

Their Lordships observe in the first place that the date of division of the capital of the fund is a *dies certus*, the death of the son of the testatrix, which in the course of nature must occur sooner or later. In the next place, the direction to divide the capital among the named beneficiaries on the arrival of that *dies certus* is not accompanied by any condition personal to the beneficiaries, such as their attainment of majority or the like. The object of the postponement of the division is obviously only in order that the son may during his lifetime enjoy the income. The mere postponement of distribution to enable an interposed life-rent to be enjoyed has never by itself been held to exclude vesting of the capital.

The distinction between a present gift coupled with a postponement of the date of payment and a direction to pay at a future date without any words of present gift is no doubt an important distinction and is in certain circumstances an element in determining whether vesting *a morte testatoris* has or has not taken place, as where conditions of survivorship and the like are added to the direction to pay. But where there is a direction to pay the income of a fund to one person during his lifetime and to divide the capital among certain other named and ascertained persons on his death, even although there are no direct words of gift either of the life interest or of the capital, the rule is that vesting of the capital takes place *a morte testatoris* in the remaindermen. The principle is thus stated in JARMAN ON WILLS, 7th Edn., p. 1377,

Even though there be no other gift than in the direction to pay or distribute *in futuro*; yet if such payment or distribution appear to be postponed for the convenience of the fund or property, the vesting will not be deferred until the period in question. Thus, where a sum of stock is bequeathed to A for life; and, after his decease, to trustees, upon trust to sell and pay and divide the proceeds to and between C and D, or to pay certain legacies thereof to C and D; as the payment or distribution is evidently deferred until the decease of A, for the purpose of giving precedence to his life interest, the ulterior legatees take a vested interest at the decease of the testator.

As the learned editor points out, SIR J. WIGRAM, V.-C., in *Packham v. Gregory* (4), at p. 398 :

expressed his entire concurrence in the doctrine thus stated by Mr. Jarman, which is further supported by numerous authorities.

Their Lordships refer to the admirable opinion of MIDDLETON, J.A., in *Re McFarlane* (5), at pp. 387 *et seq.* The learned Judge in that case felt himself constrained, with his colleagues of the Court of Appeal for Ontario, to bow to the decision in *Busch's* case (3), but he indicated that otherwise he would have reached a different conclusion. In the course of his opinion he cited the case of *Re Bennett's Trust* (6), in which SIR W. PAGE WOOD, V.-C., at p. 283, used words which may here be repeated :

It is clear that the use of the words "pay and transfer," as the only words of gift, does not make such a bequest contingent. The true criterion is that which is mentioned in *Leeming v. Sherratt* (7), namely, whether the postponement of the division or payment was on account of the position of the property, or of the person to whom the deferred interest is given. If the reason is simply, that a life interest is previously given to another person, so that the fund cannot be divided or paid over until his death, and is not a reason personal to the legatee of the absolute interest, such as his attaining twenty-one, it is treated as a gift to one for life with a vested remainder to the legatees who are to take subject to the life interest.

MIDDLETON, J.A., then quotes from THEOBALD ON WILLS, 8th Edn., p. 656, the following passage based on the case just quoted and others :

When the only gift is to be found in the direction to pay or divide (a) if the postponement of division or payment is merely on account of the position of the property, if, for instance, there is a prior gift for life . . . and a direction to pay upon the decease of the legatee for life . . . the gift in remainder vests at once . . . (b) but where the payment is deferred for reasons personal to the legatee, the gift will not vest till the appointed time.

Their Lordships are of opinion that the law is correctly stated in these quotations. In *Busch's* case (3), NEWCOMBE, J., referred to a passage in WILLIAMS ON EXECUTORS, 11th Edn., p. 981 (now 12th Edn., pp. 795, 6), as supporting the view, which that learned judge and the other members of the Supreme Court adopted. The words are :

Where there is no gift but by a direction to pay, or divide and pay, at a future time, or on a given event, or to transfer "from and after" a given event, the vesting will be postponed till after that time has arrived, or that event has happened, unless, from particular circumstances, a contrary intention is to be collected.

The learned judge adds :

To the like effect is the text of Mr. Jarman's original edition, as incorporated at p. 1399

(7th Edn., p. 1376). But, as has been seen above, Mr. Jarman in the subsequent passage which has been quoted substantially qualified the

generality of his statement and indicated its inapplicability to cases such as the present. Similarly the view expressed in the passage which NEWCOMBE, J., quoted from WILLIAMS ON EXECUTORS, is recognised by the learned author a few pages further on (12th Edn., p. 802) as not universally accepted and as possibly subject to qualification, and in this connection he refers to Mr. Jarman's limitation of its application with which their Lordships agree.

Adverting to the other reasons which influenced the Supreme Court in reaching their decision in the present case, their Lordships do not find any special significance, indicative of a different intention, in the contrast between the expressions "I give, devise and bequeath" or "I give and bequeath" used in the case of the legacies payable on the death of the testatrix and the words "I direct that the said fund of \$100,000.00 is to be divided, etc.," used in the case of the destination of that fund. The difference would appear to be occasioned simply by the circumstance that in the one set of instances the testatrix was giving ordinary legacies immediately payable, whereas in the case of the \$100,000.00 fund she desired to give a series of rather elaborate directions. Their Lordships also disagree with the view that the executors of the testatrix are in some way disassociated from the \$100,000.00 fund. The whole interest of the testatrix in the fund necessarily passed to the executors on her death and they immediately became responsible for its due administration (see the Ontario Devolution of Estates Act, 1927 (R.S.O. c. 148) s. 2). The directions of the testatrix with regard to it are directions which it is the duty of the executors to see carried into effect. Nor do their Lordships draw from the language of cl. 7 of the will any inference that the testatrix intended to postpone vesting till the period of division. The words "would have been entitled had she survived" they read as merely demonstrative of the share in question and not as intended to qualify the title to such share.

As RINFRET, J., in giving the reasons of the Supreme Court did not profess to rely on the previous decision of the Court in *Busch's* case (3) and protested against the view that that case had laid down any rule of general application, it would be unnecessary for their Lordships to refer to it were it not that it appears to have been treated as a binding authority, at least in the Courts of Ontario, in the present as well as in other cases. Their Lordships, having read the opinion of NEWCOMBE, J., confess to having some sympathy with the judges who found in *Busch's* case (3) a definite enunciation or at least a definite application of the principle that, if there are no words of present gift but only a direction to pay or divide at a future time, vesting is postponed to that future time. The observations of the learned judge himself on what was decided in *Busch's* case (3), in the subsequent case of *Singer v. Singer* (8), at p. 49, point in the same direction. It is perhaps sufficient to say that if any

such principle is laid down by *Busch's* case (3), their Lordships cannot countenance it.

Their Lordships accordingly are of opinion that the first question submitted to the Supreme Court should be answered not in the negative but in the affirmative. This necessitates a consideration of the second question which on the view of the Supreme Court did not arise. In their Lordships' opinion the destination-over in cl. 7 of the will is plainly applicable to the legacies in cl. 5. It was suggested that it applied only to the immediately preceding bequest of residue, but the contingency of the legatees predeceasing the son of the testatrix is inapplicable to the bequest of residue, which admittedly vests *a morte*, and is appropriate only to the legacies in the fifth clause. As to the effect of cl. 7 their Lordships entertain no doubt. All the legatees have survived the testatrix so that the only contingency now affecting them is the contingency of predeceasing the son of the testatrix "leaving issue." A legatee predeceasing the son without leaving issue would not be affected by the clause and the interest of such a legatee would pass on her death to her representatives. But the contingency of death "leaving issue," with the gift-over in that event to such issue, is, in their Lordships' opinion effectual to render the legacies subject to defeasance or divestiture in that event. The contingency of predecease "leaving issue," in other words, is a resolute, though not a suspensive condition; it does not prevent vesting *a morte* but it prevents that vesting from being absolute and renders it subject to divestiture in the event of this specified contingency happening. This is in accordance with well-settled principles.

Their Lordships will humbly advise His Majesty that the appeal should be allowed, that the judgment of the CHIEF JUSTICE of the High Court of Ontario dated Mar. 25, 1933, so far as declaring that the legacies directed by the testatrix in cl. 5 of her will to be paid to the beneficiaries therein named did not become vested upon the death of the testatrix, and the judgment of the Supreme Court of Canada dated Mar. 6, 1934 (except so far as it deals with costs) should be recalled and that the case should be remitted to the Supreme Court with directions to answer the questions appended to the special case as follows:—Question (a), the legacies referred to became vested upon the death of the testatrix. Question (b), the legacies referred to are liable to be divested in the case of any legatee who predeceases the son of the testatrix leaving issue. The costs of all parties as between solicitor and client to the appeal will be borne by the capital of the \$100,000.00 fund.

Appeal allowed. The costs of all parties as between solicitor and client to the appeal to be borne by the capital of the \$100,000.00 fund.

Solicitors: *Lawrence Jones & Co.* (for the appellant); *Blake & Redden* (for the respondents).

[Reported by T. A. DILLON, Esq., Barrister-at-Law.]

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